Supreme Court, U.S.
FILED
OCT 14 2010
OFFICE OF THE CLERK

No. 10-516

In The
Supreme Court of the United States

BOBBY J. RAST, DANIEL B. (DANNY) RAST, AND RAST CONSTRUCTION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM N. CLARK*
WILLIAM H. MILLS
GLORY R. MCLAUGHLIN
REDDEN, MILLS & CLARK, LLP
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457
WNC@rmclaw.com
WHM@rmclaw.com
GRM@rmclaw.com

TERRY W. GLOOR
100 Williamsburg Office Park
Suite 100
Birmingham, Alabama 35216
(205) 822-1223
TWG@gloorstrickland.com

Attorneys for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether an essential element to be proven for a conviction for the offense of bribery of a State or local official under 18 U.S.C. §666(a)(2) is a specific and identifiable *quid pro quo* consisting of the specific thing of value given or promised by the alleged giver of the bribe in exchange for or intended to be in exchange for a specific action taken or promised by the alleged recipient of the bribe.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States of America

Plaintiff-Appellee

Jewell C. "Chris" McNair

Jack W. Swann

Bobby J. Rast

Daniel B. "Danny" Rast

Rast Construction, Inc.

Floyd W. "Pat" Dougherty

F.W. Dougherty Engineering & Associates, Inc.

Grady R. "Roland" Pugh, Sr.,

Roland Pugh Construction, Inc.

Defendants-Appellants

CORPORATE DISCLOSURE STATEMENT

The corporate Petitioner has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

CITATIONS OF REPORTS OF THE OPINIONS AND ORDERS ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT..... 1

STATEMENT OF BASIS FOR JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE..... 3

ARGUMENT REGARDING REASONS FOR GRANTING WRIT..... 7

I. In its decision in the present case the United States Court of Appeals for the Eleventh Circuit decided an important Federal question in a way that conflicts with a relevant decision of this Court in that it decided that a *quid pro quo* is not an essential element of the offense of bribery defined by 18 U.S.C. §666(a)(2).... 7

TABLE OF CONTENTS – Continued

Page

II. The decision of the United States Court of Appeals for the Eleventh Circuit in the present case is in conflict with decisions of other United States Courts of Appeals on the matter of whether a specific and identifiable *quid pro quo* is an essential element of the bribery offense defined by 18 U.S.C. §666(a)(2) 19

III. In its decision in the present case the United State Court of Appeals for the Eleventh Circuit departed from the accepted and usual course of judicial proceedings and introduced confusion and uncertainty as to the meaning of 18 U.S.C. §666(a)(2) and the requirements for a conviction for bribery under this section, and created a lack of uniformity in Federal law as to the meaning of bribery; which departure calls for an exercise of this Court's supervisory power to insure uniformity and consistency of Federal laws 32

CONCLUSION 40

APPENDIX

Appendix A – Eleventh Circuit Opinion ..... App. 1

Appendix B – Memorandum Opinion of District Court Entered on March 27, 2006 ..... App. 187

Appendix C – Eleventh Circuit Order Denying Rehearing ..... App. 196

TABLE OF CONTENTS – Continued

Page

Appendix D – Indictment in Case Number 05-CR-061 ..... App. 198

Appendix E – Indictment in Case Number 05-CR-544 ..... App. 224

Appendix F – Portions of Jury Instructions Given by District Court ..... App. 250

Appendix G – Petitioners' Post-Trial Motions .... App. 276

1. Motions for New Trial (Case Number 05-CR-061) ..... App. 276

2. Motions for New Trial (Case Number 05-CR-544) ..... App. 315

Appendix H – Excerpts From Trial Testimony .. App. 343

1. Portion of Testimony of Barry Mosley (Case Number 05-CR-061) ..... App. 343

2. Portion of Testimony of Kimberly McNair Brock (Case Number 05-CR-061) ..... App. 348

3. Portion of Testimony of Nancy Cole (Case Number 05-CR-061) ..... App. 353

4. Portion of Testimony of Harry Chandler (Case Number 05-CR-061) ..... App. 366

5. Portion of Testimony of Donna Jones (Case Number 05-CR-061) ..... App. 383

6. Portion of Testimony of Wayne Hendon (Case Number 05-CR-544) ..... App. 400

7. Portion of Testimony of Bill Bailey (Case Number 05-CR-544) ..... App. 404

TABLE OF CONTENTS – Continued

Page

8. Portion of Testimony of Donna Jones (Case Number 05-CR-544) ..... App. 408

9. Portion of Testimony of Jack Swann (Case Number 05-CR-544) ..... App. 450

10. Portion of Testimony of Ronnie Ross (Case Number 05-CR-544) ..... App. 468

11. Portion of Testimony of Bob Lochamy (Case Number 05-CR-544) ..... App. 473

12. Portion of Testimony of Michael Steven Smith (Case Number 05-CR-544) ..... App. 480

TABLE OF AUTHORITIES

Page

CASES

Kolender v. Lawson, 461 U.S. 352 (1983) 37

McClain v. Metabolite International, Inc., 401 F.3d 1233 (11th Cir. 2005).....30

McNally v. United States, 483 U.S. 330 (1987) 37

Moore v. United States, 429 U.S. 20 (1978).....38

Ohio v. U.S. Department of Interior, 880 F.2d 432 (D.C. Cir. 1989).....30

Skilling v. United States, 561 U.S. ___, 130 S.Ct. 2896 (2010).....*passim*

United States v. Abbey, 560 F.3d 513 (6th Cir. 2009).....36, 37

United States v. Bonita, 53 F.3d 167 (2d Cir. 1995).....28

United States v. Ganim, 510 F.3d 134 (2d Cir. 2007).....21, 22, 28, 35

United States v. Gee, 432 F.3d 713 (7th Cir. 2005).....37

United States v. Griffin, 154 F.3d 762 (8th Cir. 1998).....26, 27

United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998).....13, 22, 23, 24, 25

United States v. Mariano, 983 F.2d 1150 (1st Cir. 1993).....25, 26

United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999).....*passim*

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. VI 2, 16

STATUTES

18 U.S.C. §201 ..... *passim*
18 U.S.C. §201(b) 12, 15, 16, 37, 38
18 U.S.C. §201(b)(1) 12
18 U.S.C. §201(b)(2) 12
18 U.S.C. §201(c) 15, 16
18 U.S.C. §201(c)(1)(A) 12, 13, 14, 15
18 U.S.C. §203 14
18 U.S.C. §205 14
18 U.S.C. §207 14
18 U.S.C. §208 14
18 U.S.C. §209 14
18 U.S.C. §212 14
18 U.S.C. §213 14
18 U.S.C. §371 4
18 U.S.C. §666 ..... 2, 13, 28, 30, 32
18 U.S.C. §666(a) ..... *passim*
18 U.S.C. §666(a)(2) ..... *passim*
18 U.S.C. §1346 38
18 U.S.C. §3231 3

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. §7214 14

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 3

29 U.S.C. §186 14

RULES

SUP. CT. R. 10(a) 18, 32

MISCELLANEOUS

BLACK'S LAW DICTIONARY 1415 (Rev. 4th Ed. 1968) 7, 8, 28

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1865 (G.&C. Merriam Co. 1971) 7, 28

S.REP. No. 98-225 13

1984 U.S.C.C.A.N. 3182, 3510 ..... 13, 32

PETITION FOR WRIT OF CERTIORARI

Petitioners Bobby J. Rast, Daniel B. (Danny) Rast, and Rast Construction, Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS OF REPORTS OF THE OPINIONS AND ORDERS ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The decision of the United States Court of Appeals for the Eleventh Circuit which this petition seeks to review was entered on May 12, 2010 and the decision and opinion is reported at 605 F.3d 1152 (11th Cir. 2010), and is reprinted as Appendix A hereto. App. 1-186. No opinion was entered by the United States Court of Appeals for the Eleventh Circuit when it denied a petition for rehearing on July 20, 2010. The order denying the petition for rehearing is reprinted as Appendix C hereto. App. 196-97. An unpublished opinion of the United States District Court for the Northern District of Alabama is reprinted as Appendix B hereto. App. 187-95.

BASIS FOR JURISDICTION

The jurisdiction of this Court for this petition for writ of certiorari is invoked pursuant to Section 1254(1) of Title 28, United States Code. This petition

seeks to review the decision of the United States Court of Appeals for the Eleventh Circuit entered on May 12, 2010, which is reprinted as Appendix A. An order of the United States Court of Appeals for the Eleventh Circuit denying rehearing of the May 12, 2010 decision was entered on July 20, 2010, and is reprinted as Appendix C hereto. App. 196-97.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

1. The Sixth Amendment to the Constitution of the United States, which reads in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

2. Section 666(a)(2) of Title 18, United States Code, which reads:

> § 666. Theft or bribery concerning programs receiving Federal funds
>
> (a) Whoever, if the circumstance described in subsection (b) of this section exists –
>
> * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian

tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

* * *

STATEMENT OF THE CASE

Jurisdiction of this case in the United States Court of Appeals for the Eleventh Circuit was based on 28 U.S.C. §1291. Jurisdiction in the trial court, the United States District Court for the Northern District of Alabama, was based on 18 U.S.C. §3231.

Petitioners were indicted, along with others, in the United States District Court for the Northern District of Alabama in two cases. In one case (Case Number 05-CR-061) Petitioners were charged in six counts with six discrete briberies (Counts 19 through 24) of Jewell C. "Chris" McNair, a county official, in violation of 18 U.S.C. §666(a)(2), and in one count with conspiracy among themselves and with others to

bribe McNair in violation of 18 U.S.C. §371. Additionally, this indictment charged Petitioners Bobby Rast and Rast Construction, Inc. in three other counts with discrete briberies of three other county officials (Counts 72, 87, 89). The indictment in Case Number 05-CR-061 is Appendix D hereto. App. 198-223.

The counts of the indictment charging bribery in Case Number 05-CR-061 did not allege a *quid pro quo* in that they did not allege a specific benefit given or promised or intended to be given or promised to Petitioners in exchange for their alleged giving of the things of value described in each bribery count to county officials as a part of each separately alleged bribery offense.

In a second case (Case Number 05-CR-544) Petitioners were charged in three counts with three discrete briberies (Counts 66 through 68) of Jack W. Swann, a county official and one count (Count 51) of conspiracy to bribe Swann, in violation of 18 U.S.C. §666(a)(2) and 18 U.S.C. §371. The indictment in Case Number 05-CR-544 is Appendix E hereto. App. 224-49. The indictment in Case Number 05-CR-544 did not allege a *quid pro quo* for the alleged briberies in that it did not allege a specific benefit given or promised or intended to be given or promised to Petitioners in exchange for the alleged giving of the things of value described in each bribery count to county officials as a part of each separately alleged bribery offense.

By motions to dismiss, objections to evidence, requests for jury instructions, objections to jury

instructions, and motions for judgment of acquittal; and post-trial motions for judgment of acquittal, in arrest of judgment, and for new trial; Petitioners raised in both cases the issue that a specific and identifiable *quid pro quo* passing or expected or intended to pass between the parties to each alleged bribery, which included the specific and identifiable benefit passing or expected to pass to Petitioners in exchange for the things of value allegedly given by Petitioners to the county officials, was an essential element of the bribery offense defined by 18 U.S.C. §666(a)(2) and charged against them in the separate counts of the indictments.

In a pre-trial memorandum opinion in Case Number 05-CR-061 the District Court ruled that no specifically defined act or acts of county officials need be alleged or proven as a *quid pro quo* in a prosecution for a violation of Section 18 U.S.C. §666(a). Appendix B, App. 187-95. All of Petitioners' motions, requests, and objections raising the *quid pro quo* issue were overruled or denied.

The two indictments were tried in separate trials in the District Court. Petitioners Bobby J. Rast and Rast Construction, Inc. were convicted on certain counts in each case, and Petitioner Daniel B. (Danny) Rast was convicted on certain counts in one case (he was acquitted of all charges in the other case), of bribery in violation of 18 U.S.C. §666(a)(2) and conspiracy to commit bribery. Petitioners appealed their convictions to the United States Court of Appeals for the Eleventh Circuit. Petitioners' cases were consolidated on

appeal with co-defendants and with appeals of other defendants from other trials of related charges. The consolidated appeals resulted in the single decision of the Eleventh Circuit rendered on May 12, 2010 and reported at 605 F.3d 1132, which is the decision this petition seeks to review.

On appeal Petitioners raised the same issue raised in the District Court – that an identifiable and specific *quid pro quo* passing or intended to pass between the parties to each alleged bribery, including the specific and identifiable benefit passing or intended to pass from the county officials to Petitioners in exchange for their alleged gifts or payments, was an essential element of the offense of bribery charged in the bribery counts and in the conspiracy to commit bribery counts of the indictments. The Eleventh Circuit, in an opinion rendered on May 12, 2010, held that such a *quid pro quo* is not an essential element of the offense described by 18 U.S.C. §666(a)(2) and affirmed the Petitioners' multiple bribery and conspiracy to commit bribery convictions. App. 1-186. On July 20, 2010 the Eleventh Circuit denied Petitioners' petition for rehearing of the May 12, 2010 decision. App. 196-97.

ARGUMENT REGARDING REASONS FOR GRANTING THE WRIT

I. In its decision in the present case the United States Court of Appeals for the Eleventh Circuit decided an important Federal question in a way that conflicts with a relevant decision of this Court in that it decided that a *quid pro quo* is not an essential element of the offense of bribery defined by 18 U.S.C. §666(a)(2).

In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), in conflict with the Eleventh Circuit decision in the present case, in interpreting the Federal bribery statute applicable to Federal officials, 18 U.S.C. §201, this Court emphatically said bribery requires a *quid pro quo*. At the heart of the question presented by this petition is the term "*quid pro quo*". Its meaning and significance inculcate that the writ should be granted in this case.

The term "*quid pro quo*", though of Latin origin, is not an uncommon expression for those whose language is English. It is often used, especially in the legal field.

Webster defines *quid pro quo* as:

Something for something (else)

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1865 (G.&C. Merriam Co. 1971). *Black's*

Law Dictionary defines *quid pro quo* similarly and somewhat more expansively as:

> What for what; something for something. Used in the law for the giving one valuable thing for another.

BLACK'S LAW DICTIONARY 1415 (Rev. 4th Ed. 1968). Basically, the term *quid pro quo* equates to the subject matter or ingredients of an exchange or swap. The significance of the exchange concept and the quoted definitions is the thrust of this petition. It demonstrates the serious error of the Eleventh Circuit in deciding the present case in a way that conflicts with a decision of this Court on an important interpretation of a Federal criminal statute.

It is important to recognize that in the present case Petitioners were charged with multiple bribery offenses, not merely one bribery offense, in each case. In Case Number 05-CR-061 there are six discrete bribery accusations against Petitioners. App. 198-223. In Case Number 05-CR-544 there are nine discrete bribery accusations against one or more of the Petitioners. App. 224-49. Consequently, if a *quid pro quo* is an element of bribery it was an element requiring proof as to the separate bribery charged in each of the separate bribery counts in each case.

The Eleventh Circuit opinion in the present case explicitly holds that a *quid pro quo* is not an essential element of the offense of bribery defined by 18 U.S.C. §666(a)(2). The decision effectively holds that a bribery of a state, county or local official may be

proven, and a conviction for bribery sustained, without evidence identifying the "something for something (else)", i.e., without proving the specific benefit the defendant received, expected, or was promised from an official in exchange for the thing of value given or promised to the public official by the defendant.

The Eleventh Circuit opinion said:

> Thus, we readily determine the Indictment itself was not defective for failure to allege a specific *quid pro quo*.

605 F.3d at 1186 (App. 56).

* * *

> The requirement of a "corrupt" intent in §666 does narrow the conduct that violates §666 but does not impose a specific *quid pro quo* requirement.

* * *

> For all of these reasons, we now expressly hold there is no requirement in §666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.

* * *

> To be sure, many §666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to

> a specific official act by that County employee. The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific *quid pro quo*.

605 F.3d at 1188 (App. 59-61).

In contrast, the *Sun-Diamond* decision in interpreting the bribery statute applicable to Federal officials says:

> Initially, it will be helpful to place § 201(c)(1)(A) within the context of the statutory scheme. Subsection (a) of § 201 sets forth definitions applicable to the section – including a definition of "official act," § 201(a)(3). Subsections (b) and (c) then set forth, respectively, two separate crimes – or two pairs of crimes, if one counts the giving and receiving of unlawful gifts as separate crimes – with two different sets of elements and authorized punishments. *The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was corruptly given, offered, or promised* to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, *inter alia*, "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient). The second crime, defined in

§ 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), "for or because of any official act performed or to be performed by such public official."

[1] The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. *In other words, for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act.* An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken. The punishments prescribed for the two offenses reflect their relative seriousness: Bribery may be punished by up to 15 years' imprisonment, a fine of $250,000 ($500,000 for organizations) or triple the value of the bribe, whichever is greater, and disqualification from holding government office. See 18 U.S.C. §§ 201(b) and 3571. Violation of the illegal gratuity statute, on the other hand, may be punished by up to two years' imprisonment

> and a fine of $250,000 ($500,000 for organizations). See §§ 201(c) and 3571.
>
> [2] The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a *quid pro quo*.

526 U.S. at 404-05 (Emphasis added).

While the *Sun-Diamond* case was not a bribery prosecution it expressly defined "bribery" for purposes of Federal criminal law. It was a prosecution for violation of 18 U.S.C. §201(c)(1)(A), the statute which criminalizes gratuities to Federal officials. But, as the *Sun-Diamond* decision makes clear, §201(c)(1)(A) is but "one element" of a "framework" and "one strand" of a "web" of Federal law defining and punishing impermissible gifts, which includes bribes. 526 U.S. at 400, 409. Another part of this framework and web is obviously §201(b)(1) and §201(b)(2), which the *Sun-Diamond* decision discusses and makes clear are bribery offenses, as distinguished from the less culpable impermissible gratuity offense that §201(c)(1)(A) defines.

The prosecution against Petitioners in the present case is for bribery under 18 U.S.C. §666(a)(2), not under §201. But, §666(a) is surely another element in the framework and strand in the web of Federal law referred to in *Sun-Diamond* as defining and punishing impermissible gifts, and, in particular, bribes, to public officials. See 526 U.S. at 400, 409. Both §201(b) and §666(a)(2) have been recognized by

this Court as bribery statutes which provide a definition of bribery for other Federal prosecutions. See *Skilling v. United States*, 561 U.S. ___, 130 S.Ct. 2896, 2933 (2010).

No valid reason exists to conclude that bribery under §201, as the *Sun-Diamond* case defines it, is different from bribery under §666. This is especially true since §666 was enacted by Congress for the express purpose of closing a potential gap left by §201 and making unlawful (under certain circumstances) the same type of conduct as to State or local government officials as that criminalized by §201 as to Federal officials. See S.REP. No. 98-225, as summarized at 1984 U.S.C.C.A.N. 3182, 3510; See also, *United States v. Jennings*, 160 F.3d 1006, 1012-13 (4th Cir. 1998). Moreover, the two statutes use practically identical words – "corruptly gives, offers or promises" (§201) or "corruptly gives, offers, or agrees to give" (§666) – to describe the criminal conduct of a violator.

Also persuasive to the determination that the Eleventh Circuit's interpretation and construction of §666(a)(2) conflicts with a relevant decision of this Court are certain supporting conclusions the Court reached in *Sun-Diamond*. First, as mentioned above, *Sun-Diamond* found §201(c)(1)(A) to be "one element" of the "framework" and "one strand of an intricate web" of laws and regulations governing impermissible gifts, including bribes, to public officials. 526 U.S. at 400, 409. Section 666(a)(2), being surely another "element" in that same framework and another

"strand" in that same web, was clearly not enacted by Congress to be interpreted and construed applying different reasoning and a different definition of a bribe from that used in *Sun-Diamond*.

In *Sun-Diamond* the Court observed that Congress knew how to prohibit absolutely any gift to a public official or employee and demonstrated this ability in such statutes as 18 U.S.C. §§203, 205, 207, 208, 209, and 212-13, 26 U.S.C. §7214, and 29 U.S.C. §186. See 526 U.S. at 408-09. In recognition of this fact, *Sun-Diamond* concluded a narrow, rather than a sweeping, interpretation of its prohibitions was appropriate for §201(c)(1)(A). Being a part of the same "framework" and "web", a like narrow interpretation is appropriate for §666(a)(2). The scalpel approach rather than the meat axe approach comparison made in *Sun-Diamond* (see 526 U.S. at 412) is appropriate for §666(a)(2). When applied to §666(a)(2) the scalpel approach instructs that §666(a)(2) be read to be an offense that must be "precisely targeted". See 526 U.S. at 412. This reasoning further instructs that a specific and identifiable *quid pro quo* is required for a §666(a)(2) violation.

The Government argued in *Sun-Diamond* that §201(c)(1)(A) required no nexus or link between a gift and a specific official act.[1] The Court's rejection of

---

[1] From the concession the Government apparently made in *Sun-Diamond* with respect to the jury instructions given in that case being correct it seems that the Government acknowledged in *Sun-Diamond* that in a bribery case proof of a connection

(Continued on following page)

that argument provides further persuasion that a *quid pro quo* requirement is the proper view of §666(a)(2). In rejecting this argument, *Sun-Diamond* squarely held:

> [I]n order to establish a violation of 18 U.S.C. §201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given.

526 U.S. at 414. This rejection is especially significant in the context of the total "framework" or "web" of Federal laws relating to impermissible gifts.

Section 201(c)(1)(A) is obviously considered by Congress to be an offense involving less reprehensible conduct than §201(b) and §666(a)(2). The maximum imprisonment for a §201(c)(1)(A) conviction is two years whereas for §201(b) it is fifteen years and for §666(a)(2) it is ten years. See 18 U.S.C. §§201(b), 201(c), and 666(a). Being a part of the same statutory "framework" or "web" designed to punish the giving or receiving of impermissible gifts, Congress surely did not intend, and this Court by its analysis of this statutory "framework" or "web" in *Sun-Diamond* surely did not mean to say, that the less serious §201(c) offense requires a higher degree of proof, i.e., a link between a gift and a specific official act, and that the more serious and more severely punishable

---

between the defendant's intent and a specific official act, a *quid pro quo*, is required. 526 U.S. at 405.

§201(b) and §666(a) offenses can be established without proof of such a link and with no proof identifying the actual or intended benefit to be conferred on the bribe-giver or bribe-receiver in exchange for, or as the *quid pro quo* for, a bribe.

A lower standard of proof requirement for the more culpable offenses (§§201[b] and 666[a]) than for the less culpable offense (§201[c]) especially makes no sense for a statute like §666(a). Section 666(a) is in many respects a rather vague statute. It uses such generalized, unspecific, and obscure language as "influence or reward", "in connection with", and "any business, transaction," etc. Without requiring some specific identification by allegation and proof of the particular "influence or reward", "connection", or "business, transaction," etc. on which the prosecution is based leaves a defendant totally uninformed, in violation of the Sixth Amendment, as to the accusation to be defended against. Further, and equally or more egregious, it allows a conviction for bribery without the prosecution being required to prove the fundamental ingredient of a bribe – a *quid pro quo*, the "something" for "something (else)" exchange or swap that must occur for a bribery to exist. If the act of the public official the defendant is buying with a gift or promise need not be shown an essential element of bribery is obviously missing.

The *Sun-Diamond* case surely recognized the necessity of an exchange to have a bribery and the necessity for identifying the "something" exchanged for "something (else)" when it said:

> [F]or bribery there must be a *quid pro quo* – a specific intent to give or receive something of value in *exchange* for an official act.

526 U.S. 404-05 (Emphasis in original). The effect of the Eleventh Circuit decision is that a bribery conviction may stand even though the precise exchange and the actual or intended benefit for the alleged bribe-giver (or bribe-recipient) are a mystery – a mystery that the prosecution evidence need not resolve or even consider.

In the present case no evidence linked any gifts, etc., by Petitioners described in either count of the indictments to any specific favor or benefit they contemplated, requested, received, or were promised flowing from an act of a county official. The Eleventh Circuit opinion does not point to any trial evidence showing that Petitioners requested or were promised any benefits or favors from McNair, Swann, or any other county employee or to any agreement, understanding, or proposal that Petitioners were, would be, or had been favored with contracts because of any gifts they made to McNair, Swann or others. Abundant defense evidence explained that any gifts by Petitioners to county officials were not for corrupt purposes. Rather, they were prompted by long and close personal friendships between Petitioners and the county officials involved and the long tradition and practice of Petitioners in generously assisting friends with particular needs and in generally being charitable and generous to others in the community with no expectation of recompense. App. 343-486.

Further, abundant defense evidence (some from Government witnesses) showed that county contracts were awarded to Rast Construction, Inc. not because of corrupt gifts but because of competitive bids, a long history of outstanding performance of county contracts, and a proven ability and willingness to perform emergency work when the county needed it. App. 343-486. When the jury was instructed that proof of a *quid pro quo* was not required (Appendix F, App. 250-75) it effectively was told that this defense evidence was meaningless and should be ignored. Had the prosecution been required to prove a *quid pro quo* for each separate bribery accusation in each separate bribery count this defense evidence would have had enormously more probative value in countering the accusations against Petitioners.

In the *Sun-Diamond* case this Court decided that a *quid pro quo* is an essential element of the Federal offense of bribery of Federal officials. As discussed, there is no reasonable justification for reaching a different conclusion as to the Federal offense of bribery of state or local officials under §666(a)(2). In the present case the Eleventh Circuit decided that a *quid pro quo* is not a necessary element of bribery under §666. In doing so the Eleventh Circuit decided an important question of Federal law in a way that conflicts with the decision of this Court in *Sun-Diamond*. This conflict warrants granting the writ of certiorari in this case. See SUP. CT. R. 10(a).

II. The decision of the United States Court of Appeals for the Eleventh Circuit in the present case is in conflict with decisions of other United States Courts of Appeals on the matter of whether a specific and identifiable *quid pro quo* is an essential element of the bribery offense defined by 18 U.S.C. §666(a)(2).

In holding that a *quid pro quo* is not an essential element of an 18 U.S.C. §666(a)(2) bribery charge the Eleventh Circuit said in the present case:

> Thus, we readily determine the Indictment itself was not defective for failure to allege a specific *quid pro quo*.

605 F.3d at 1186 (App. 56).

* * *

> The requirement of a "corrupt" intent in §666 does narrow the conduct that violates §666 but does not impose a specific *quid pro quo* requirement.

* * *

> For all of these reasons, we now expressly hold there is no requirement in §666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.

* * *

> To be sure, many §666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee. The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific *quid pro quo*.

605 F.3d at 1188 (App. 59-61).

* * *

> In concluding §666 does not require a specific *quid pro quo*, we align ourselves with the Sixth and Seventh Circuit.

605 F.3d at 1189 (App. 62)[2]

The decision of the Eleventh Circuit in the present case conflicts with decisions of other United States Courts of Appeals, namely the First, Second, Fourth, and Eighth Circuits, which have held that a *quid pro quo* is an essential element of the offense described by 18 U.S.C. §666(a)(2).

---

[2] By this statement the Eleventh Circuit tacitly acknowledges a conflict among the Circuits on this issue.

Second Circuit

In *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007), a prosecution for, *inter alia*, violating 18 U.S.C. §666(a)(1)(B), the Second Circuit held:

> Like extortion, the crime of bribery requires a *quid pro quo*. *See, e.g., Alfisi*, 308 F.3d at 148 ("[B]ribery . . . requires a *quid pro quo* element."); *see also Sun-Diamond*, 526 U.S. at 405, 119 S.Ct. 1402 (distinguishing an illegal gratuity from a bribe which "requires proof of a *quid pro quo*").

510 F.3d at 148.

* * *

> The term "bribe" means a corrupt payment that a public official accepted or agreed to accept with the intent to be influenced in the performance of his or her public duties. *A bribe requires some specific quid pro quo, a Latin phrase meaning this for that or these for those, that is, a specific official action in return for the payment or benefit. If the public official knows that he or she is expected as a result of the payment to exercise particular kinds of influence or decision making to the benefit of the payor, and, at the time the payment is accepted, intended to do so as specific opportunities arose, that is bribery.*

* * *

> [B]ribery is not proved if the benefit is intended to be, and accepted as simply an effort to buy favor or generalized goodwill from

> a public official who either has been, is, or may be at some unknown, unspecified later time, be in a position to act favorably on the giver's interests – favorably to the giver's interest. That describes legal lobbying.
>
> * * *

510 F.3d at 149.

* * *

> The third element that the government must prove is that the defendant acted with the corrupt intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the City of Bridgeport itself or one of its agencies. *A "corrupt intent" means the intent to engage in some specific quid pro quo* . . . or the intent to give some advantage inconsistent with official duty and the rights of others. "Corruptly" means having an improper motive or purpose.

510 F.3d at 151.

Fourth Circuit

In *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), a prosecution for violating 18 U.S.C. §666(a)(2), the Fourth Circuit held:

> By enacting § 666 Congress supplemented § 201 to make clear that federal law prohibits "significant acts of . . . bribery involving

> Federal monies. . . . " *Id.* at 369, 1984 U.S.C.C.A.N. at 3510.
>
> * * *
>
> Whether a payment is a bribe or an illegal gratuity under § 201 depends on the intent of the payor. A bribe requires that the payment be made or promised "corruptly," that is, with "corrupt intent." Under § 201 "corrupt intent" is the intent to receive a specific benefit in return for the payment. [citations omitted]. In other words, the payor of a bribe must intend to engage in "'some more or less specific *quid pro quo*'" with the official who receives the payment.

160 F.3d at 1013.

> * * *
>
> One has the intent to corrupt an official only if he makes a payment or promise with the intent to engage in a fairly specific *quid pro quo* with that official. Of course, a court need not resort to Latin to make this point. It simply may explain that the defendant must have intended for the official to engage in some specific act (or omission) or course of action (or inaction) in return for the charged payment.
>
> Even if a court does not properly define "corrupt intent," it can adequately convey that concept to the jury by describing the exact *quid pro quo* that the defendant is charged with intending to accomplish. For example, a court may inform the jury that it may find

> the defendant guilty only if it determines "that *(defendant's name)* gave *(the charged payment)* corruptly, that is, with the intent to induce *(official's name)* to commit *(the specific official act or omission that defendant is charged with intending to induce).*" *See, e.g.*, Committee on Model Criminal Jury Instructions Within the Eighth Circuit, *Manual of Model Jury Instructions for the District Courts of the Eighth Circuit*, § 6.18.201A (1996) (instruction for § 201(b)(1)). Such an instruction can satisfactorily convey to the jury the concept of *quid pro quo* (even absent a proper definition of "corrupt intent")if it requires the jury to find that the defendant made or promised a specific payment in exchange for a specific official act or omission. Even so, this type of instruction is best used to amplify, rather than define, the concept of *quid pro quo*.

160 F.3d at 1018-19.

* * *

On our assumption that § 666 makes the same bribe/gratuity distinction as § 201, a court instructing a jury on § 666(a)(2) must define the "corrupt intent" element in the same way as it would if instructing on § 201(b). Thus (we assume) a court must instruct the jury that it may convict a defendant for violating § 666(a)(2) only if it finds that the defendant intended to exchange a

> payment for some specific official act or course of action.

160 F.3d at 1019.

* * *

> In sum, unless the district court defined "corrupt intent" to include the *quid pro quo* requirement, it gave an erroneous instruction on an essential element of bribery.

160 F.3d at 1021.

* * *

> In defining "corrupt intent" the trial court told the jury that "[a]n act is done with a corrupt intent if it is performed voluntarily and intentionally . . . and with the purpose . . . of either accomplishing an unlawful end or result or accomplishing some otherwise lawful end or result by an unlawful manner or means." This was error. The definition fails to explain that "corrupt intent" is the intent to induce a specific act. Therefore, the district court's instruction on § 666(a)(2) left out the *quid pro quo* requirement. Standing alone, this instruction was plainly erroneous.

160 F.3d at 1021.

* * *

First Circuit

In *United States v. Mariano*, 983 F.2d 1150 (1st Cir. 1993), a case in which it was necessary to

determine whether the conduct of the defendant was bribery in order to properly apply the Sentencing Guidelines, the First Circuit held:

> The essential difference between a bribe and an illegal gratuity is the intention of the bribe-giver to effect a *quid pro quo. See United States v. Muldoon,* 931 F.2d 282, 287 (4th Cir. 1991). Hence, a bribery guideline, section 2C1.1, applies when a transfer of money has "a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions." U.S.S.G. § 2C1.1, comment. (backg'd). The gratuity provision, on the other hand, does not include a corrupt purpose as an element of the offense. *See* U.S.S.G. § 2C1.2, comment. (backg'd).
>
> * * *
>
> Since Mariano and Butterworth each sought to receive a *quid pro quo,* in the form of future (favorable) treatment, and since the offenses to which they pleaded guilty involved corrupt intent, the district court's determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous.

983 F.3d at 1159.

Eighth Circuit

In *United States v. Griffin*, 154 F.3d 762 (8th Cir. 1998), a case in which the elements of bribery under 18 U.S.C. §666(a) were relevant to a proper

application of the Sentencing Guidelines, the Eighth Circuit held:

> The statutory index of the Sentencing Guidelines, which specifies which Guidelines apply to various criminal statutes, lists both U.S.S.G. § 2C1.1 (bribes) and § 2C1.2 (gratuities) as applicable to violations of 18 U.S.C. § 666(a)(1)(B), the statute Griffin has admitted violating. See U.S.S.G. App. A, at 421. In this case, we agree with the District Court that § 2C1.1 was the applicable Guideline. The distinction between a bribe and an illegal gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo,* something that the recipient would not otherwise have done. See *United States v. Mariano,* 983 F.2d 1150, 1159 (1st Cir. 1993); *United States v. Muldoon,* 931 F.2d 282, 287 (4th Cir. 1991). We agree with the District Court that the evidence established the necessary *quid pro quo,* or payment of money by Simmons in exchange for Griffin's official actions on her behalf.

154 F.3d at 763.

The quoted excerpts set out above demonstrate a conflict between decisions of the Second, Fourth, First and Eighth Circuits and the decision of the Eleventh Circuit in the present case.

Reason, logic, and legislative history favor the views taken by the First, Second, Fourth and Eighth Circuit in the cases cited above with respect to a *quid pro quo* being an essential element of a §666(a)(2)

violation. A brief review of the soundness of the principles underlying the decisions of these Circuits confirm this conclusion.[3]

As this Court noted in *Sun-Diamond*, "the distinguishing feature" of bribery's intent element is that "there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act". *Sun-Diamond*, *supra* at 405. As discussed above under Part I, an "exchange" is fundamental and a prerequisite to the existence of a bribe – usually a payment as consideration for the specific influenced conduct. It is the exchange or swap that creates the *quid pro quo* concept in a bribery. Some cases have referred to this necessary exchange in a bribery by translation of the Latin phrase "*quid pro quo*" into simple language not unlike that used by Webster and Black's Law Dictionary: "this for that" or "these for those". See *United States v. Ganim*, *supra* at 149.

An exchange necessarily requires (at least) two phenomena or realities – the "this" and the "that". An exchange or swap is inherently a two-sided event. Consequently, to identify an exchange there must be a full identification of both of its sides. The effect of

---

[3] No contention was made in the present case that the conduct of Petitioners was an illegal gratuity rather than a bribe, so there is no reason to consider the question raised in some cases of whether §666 criminalizes both a bribe and an illegal gratuity. See, e.g., *United States v. Bonita*, 53 F.3d 167 (2d Cir. 1995).

the Eleventh Circuit decision is to permit a conviction for bribery even though the Government does not specifically and comprehensively prove an exchange or the specific intent of the accused briber to enter into an exchange whereby the accused briber gives something to an official to influence the official to give the accused briber some specific benefit by an official act.

The definition of bribery, as well as common sense, tells us an exchange occurs in a bribery only when there is a passing or intended passing of a benefit ("this") from the bribe-giver to the bribe-recipient and a passing or the intended passing of a benefit ("that") from the bribe-recipient to the bribe-giver. Unless there is a benefit, or promise or anticipated benefit, for both the bribe-giver and the bribe-recipient, there is no way to have an exchange, and therefore, no bribery exists. Unless there is a fully proven identifiable exchange or intent to enter into such an exchange there is no basis for concluding that a bribery has actually occurred.

The Government argued in the District Court that Petitioners made gifts to County officials and later they were awarded contracts; therefore the contracts must have been because of the gifts, hence a bribe. The Eleventh Circuit decision effectively endorsed the philosophy of this argument. This reasoning process is captured in the Latin phrase: *post hoc ergo propter hoc*, "after this because of this". Courts have consistently rejected *post hoc ergo propter hoc*, in fact have denounced it as a fallacy, as a rationale

for concluding that a temporal relationship equates to proof of a causal relationship. See, e.g., *Ohio v. U.S. Department of Interior*, 880 F.2d 432, 473 (D.C. Cir. 1989); *McClain v. Metabolite International, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005). Just because one event comes after another does not mean that the first event was the cause of the second. What is missing in this reasoning, and in the Latin phrase, in the bribery context is the "exchange", the essence of a *quid pro quo*.

The irrationality of a specific bribery[4] for which a person can be convicted and imprisoned, as §666 contemplates, without a specific and identifiable *quid pro quo* is illustrated by the jury instructions given by the District Court in the present case (Appendix F, App. 250-75) which the Eleventh Circuit decision approved. The instructions describe in considerable detail the "this" part of a bribery transaction, describing at length the allegations of the indictments regarding payments made by Petitioners along with the admonition that the prosecution must prove the "this". However, for the "that" part of the transaction the instructions were totally uninformative, merely reciting the generalized and unspecific language of

---

[4] In addition to the general principle that bribery requires a *quid pro quo*, it is important in the present case to recognize that each bribery charge required proof of a *quid pro quo*. In this case the Government chose to charge Petitioners in multiple counts with several, discrete briberies. This being true a *quid pro quo*, an exchange of benefits – one for the other – must be proven separately for each count.

§666(a)(2) – "in connection with a transaction or series of transactions" with the county. App. 268, 272. These instructions left the jury totally uninformed about the "that" which must be exchanged or intended to be exchanged for the "this" as to each bribery count in order to have a bribery. It left the jury free to find Petitioners guilty based on proof of only one-half of the exchange required for bribery. Surely our Constitution demands that more than half the elements of a crime be proven in order to sustain a conviction.

The views of the First, Second, Fourth, and Eighth Circuits that a *quid pro quo* is an essential element of bribery are, as discussed above, consistent with the decision of this Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999), where the Court said:

> In other words, for bribery there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act. (Emphasis in original).

The *Sun-Diamond* case, of course (as noted above), dealt with a different bribery statute, 18 U.S.C. §201. However, as noted previously, there is no reason to make a distinction between the bribery described in §201 and the bribery described in §666(a). Section 666(a) was enacted by Congress to ensure that the type of conduct made illegal by §201 as to Federal officials was made illegal as to State officials and others under certain circumstances

involving Federal funds. See 1984 U.S.C.C.A.N. 3182, 3510. Further, the operative language describing conduct in both statutes – "corruptly gives, offers or agrees to give anything of value" (§666) and "corruptly gives, offers, or promises anything of value" (§201) – is identical in meaning and effect.

The conflict between the Circuits should be resolved and the law respecting bribery and §666(a) made uniform by granting this petition. See SUP. CT. R. 10(a).

III. In its decision in the present case the United States Court of Appeals for the Eleventh Circuit departed from the accepted and usual course of judicial proceedings and introduced confusion and uncertainty as to the meaning of 18 U.S.C. §666(a)(2) and the requirements for a conviction for bribery under this section, and created a lack of uniformity in Federal law as to the meaning of bribery; which departure calls for an exercise of this Court's supervisory power to insure uniformity and consistency of Federal laws.

The Eleventh Circuit decision which this petition seeks to review, and the decisions from the Sixth and Seventh Circuits on which it relies for support, fly in the face of the ideal of a uniform national standard for Federal criminal laws. See *Skilling v. United States*, 561 U.S. ___, 130 S.Ct. 2896, 2933 (2010). They create and foster confusion and uncertainty as

to the definition of bribery and as to the meaning of the term *quid pro quo* in a bribery context and to the issue of whether a *quid pro quo* is a necessary element for a bribery conviction under §666(a)(2). They collapse the "frame work" and dismantle the "web" (See *Sun-Diamond*, *supra*) of Federal law relating to illegal gifts to public officials. A uniform national standard for the offense of bribery becomes even more important in view of the *Skilling* decision which now makes bribery a matter of primary consideration in mail fraud honest-services prosecutions. See 130 S.Ct. at 2933.

This unsettling feature from these cases readily appears from the language of the opinions. In the present case the Eleventh Circuit's opinion said:

> We begin with the statutory language itself. Importantly, §666(a)(1)(B) and (a)(2) do not contain the Latin phrase quid pro quo. Nor do those sections contain language such as "in exchange for an official act" or "in return for an official act." In short, nothing in the plain language of §666(a)(1)(B) nor §666(a)(2) requires that a specific payment be solicited, received or given in exchange for a specific official act. To accept the defendant's argument would permit a person to pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating §666.
>
> * * *

> For all of the reasons, we now expressly hold there is no requirement in §666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a quid pro quo.
>
> * * *
>
> To be sure, many §666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee. The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific quid pro quo.

605 F.3d at 1187-88 (App. 59-61).

The Eleventh Circuit opinion states that the word "corrupt" in §666(a)(2) narrows the conduct which violates the section. See 605 F.3d at 1188. But, the court then inconsistently proceeds to broaden the reach of the section by saying there is no *quid pro quo* requirement. The court reaches this conclusion in spite of the fact that: (1) the term *quid pro quo* also does not appear in §201; (2) §666(a)(2) is a bribery statute (see *Skilling*, *supra* at 2933) and (3) its language requires that the corrupt giving, etc., be with the intent to influence or reward – obviously contemplating an exchange to accomplish this – in

connection with (as applied to the present case) county business.

There can be no doubt that the words of §666 were intended by Congress, as in §201, to describe an exchange, i.e., a gift, etc., in exchange for a specific benefit from influenced conduct in connection with state or local government. An exchange is the very essence of the occurrence the statute describes. Further, an exchange is the essence and substance of a *quid pro quo*, or as simply expressed, "this" for "that" or "something" for "something (else)".

The Eleventh Circuit attempted to avoid the requirement of a *quid pro quo* by relying upon the concept of "corrupt intent". However, the definition of "corruptly" given by the District Court and approved by the Eleventh Circuit only adds to the confusion:

> An act is done corruptly if it is performed voluntarily and deliberately for the purpose of either accomplishing an unlawful end or result or accomplishing some otherwise lawful end or lawful result by any unlawful method or means.

(App. 254). The instruction employs circular reasoning and leaves jurors still confused about exactly how one finds "corrupt intent". It is not unlawful, per se, for one to give a gift or provide a service to a state or county official, or for the official to receive it. See *Sun-Diamond*, *supra* at 408-12; *United States v. Ganim*, *supra* at 149. What is missing from the District Court's and the Eleventh Circuit's definitions

is the requirement for a *quid pro quo* or an intended *quid pro quo*.

The Sixth Circuit's decision in *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009) is equally circular and confusing in its explanation that in spite of the fact that a bribery is innately an exchange, a *quid pro quo* is not required for a §666(a)(2) violation. The *Abbey* opinion says:

> By its terms, the statute does not require the government to prove that Abbey contemplated a specific act when he received the bribe; the text says nothing of a *quid pro quo* requirement to sustain a conviction, express or otherwise: while a "*quid pro quo* of money for a specific . . . act is sufficient to violate the statute", it is "not necessary" *United States v. Gee*, 432 Fed. 2d 713-714 (7th Cir. 2005). Rather, it is enough if a defendant "corruptly solicits" "anything of value" with the "intent to be influenced or rewarded in connection" with some transaction involving property or services worth $5,000 or more.

560 F.3d at 520.

This quotation from the Sixth Circuit opinion indicates that it, like the Eleventh Circuit in the present case, ignores the inherent nature of the event the statute describes – a bribery – and the innate requirement of a bribery for an exchange, a swapping of "this" for "that", or the specific intent to do so. Again, unless there is a full identification of the "this" and the "that", the existence of an exchange becomes

amorphous and not within the realm of certainty that must be a characteristic of all criminal laws. See *Kolender v. Lawson*, 461 U.S. 352, 357-58, 361 (1983); *McNally v. United States*, 483 U.S. 330, 359-60 (1987).

The above quotation from the *Abbey* case is largely a quotation of the language of the Seventh Circuit in *United States v. Gee*, 432 F.3d 713 (7th Cir. 2005). In the *Gee* case, as in the *Abbey* case and the present case, the court ignored the essential occurrence of an exchange, a "this" for "that", or *quid pro quo*, as the core element of a bribery and the offense described by §666(a)(2).

As noted earlier, §201(b) does not contain the words "*quid pro quo*". Yet in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999), where the direct reference to bribery was to §201(b), this Court emphatically held that for bribery "there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act". Further, it should be noted, this Court has recently described both §201(b) and §666(a)(2) as bribery statutes. See *Skilling v. United States*, *supra* at 2933.

The Eleventh, Sixth and Seventh Circuit decisions have ignored the clear intent of the words of §666(a)(2), a bribery statute, to describe and require an exchange. The Eleventh Circuit's holding that it is not necessary to identify and specify by proof what is exchanged or intended to be exchanged between the

bribe-giver and the bribe-receiver makes identifying and proving an exchange, or intended exchange, which is the clear focus of §666(a)(2), an illusion and an impossibility.

The Eleventh Circuit's approach to defining bribery impacts another area of Federal criminal law. This Court in *Skilling* said in future 18 U.S.C. §1346 mail fraud honest-services prosecutions there must be proof of a bribery or kickback. The Court further stated in *Skilling* that the meaning of the term "bribery" for purposes of such 18 U.S.C. §1346 prosecutions could be derived from the "content" of 18 U.S.C. §201(b) and 18 U.S.C. §666(a)(2). The Eleventh Circuit's opinion makes it difficult or impossible to know what will be necessary to prove bribery under the honest-services statute, i.e., is a *quid pro quo* required or not?

With no requirement for proof of a completed or intended exchange of a "this" for a "that", a completed or intended bribery can exist only in supposition and not in fact. A supposition should not be, and cannot be, the evidentiary basis for a criminal conviction. See *Moore v. United States*, 429 U.S. 20, 22 (1978).

Ignoring the essential nature and components of a bribery and recognizing an illusionary and illogical broad standard for determining what conduct constitutes bribery surely is a departure from the accepted and usual course of judicial proceedings. To allow supposition to substitute for facts as the basis for a

criminal conviction is likewise a radical departure from the accepted and usual course of judicial proceedings. Formulating illogical and unsound definitions that impact other areas of Federal criminal law is also a departure from the accepted and usual course of judicial proceedings.

The Eleventh Circuit in this case; and the Sixth Circuit and the Seventh Circuit in the cited cases; have made such departures. This Court should exercise its supervisory power and correct these departures and clarify the meaning of §666(a)(2) and eliminate as authority in any Circuit the reasoning and determinations asserted by the Eleventh, Sixth, and Seventh Circuits in the cited cases as permissible in the interpretation, construction and application of Federal criminal law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM N. CLARK*
WILLIAM H. MILLS
GLORY R. MCLAUGHLIN
REDDEN, MILLS & CLARK, LLP
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457

TERRY W. GLOOR
100 Williamsburg Office Park
Suite 100
Birmingham, Alabama 35216
(205) 822-1223

Attorneys for Petitioners
**Counsel of Record*

173

No. (2)

Supreme Court, U.S.
FILED

10-516 OCT 14 2010

OFFICE OF THE CLERK

In The Supreme Court of the United States

BOBBY J. RAST, DANIEL B. (DANNY) RAST, AND RAST CONSTRUCTION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WILLIAM N. CLARK*
WILLIAM H. MILLS
GLORY R. MCLAUGHLIN
REDDEN, MILLS & CLARK, LLP
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457
WNC@rmclaw.com
WHM@rmclaw.com
GRM@rmclaw.com

TERRY W. GLOOR
100 Williamsburg Office Park
Suite 100
Birmingham, Alabama 35216
(205) 822-1223
TWG@gloorstrickland.com

Attorneys for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

APPENDIX

Appendix A – Eleventh Circuit Opinion.....App. 1

Appendix B – Memorandum Opinion of District Court Entered on March 27, 2006.....App. 187

Appendix C – Eleventh Circuit Order Denying Rehearing.....App. 196

Appendix D – Indictment in Case Number 05-CR-061.....App. 198

Appendix E – Indictment in Case Number 05-CR-544.....App. 224

Appendix F – Portions of Jury Instructions Given by District Court.....App. 250

Appendix G – Petitioners' Post-Trial Motions....App. 276

1. Motions for New Trial (Case Number 05-CR-061).....App. 276

2. Motions for New Trial (Case Number 05-CR-544).....App. 315

Appendix H – Excerpts From Trial Testimony ..App. 343

1. Portion of Testimony of Barry Mosley (Case Number 05-CR-061).....App. 343

2. Portion of Testimony of Kimberly McNair Brock (Case Number 05-CR-061).....App. 348

3. Portion of Testimony of Nancy Cole (Case Number 05-CR-061).....App. 353

TABLE OF CONTENTS – Continued

Page

4. Portion of Testimony of Harry Chandler (Case Number 05-CR-061) ..... App. 366

5. Portion of Testimony of Donna Jones (Case Number 05-CR-061) ..... App. 383

6. Portion of Testimony of Wayne Hendon (Case Number 05-CR-544) ..... App. 400

7. Portion of Testimony of Bill Bailey (Case Number 05-CR-544) ..... App. 404

8. Portion of Testimony of Donna Jones (Case Number 05-CR-544) ..... App. 408

9. Portion of Testimony of Jack Swann (Case Number 05-CR-544) ..... App. 450

10. Portion of Testimony of Ronnie Ross (Case Number 05-CR-544) ..... App. 468

11. Portion of Testimony of Bob Lochamy (Case Number 05-CR-544) ..... App. 473

12. Portion of Testimony of Michael Steven Smith (Case Number 05-CR-544) ..... App. 480

APPENDIX A

605 F.3d 1152

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Jewell C. "Chris" McNAIR, Jack W. Swann, Bobby J. Rast, Daniel B. "Danny" Rast, Rast Construction, Inc., Floyd W. "Pat" Dougherty, F.W. Dougherty Engineering & Associates, Inc., Grady R. "Roland" Pugh, Sr., and Roland Pugh Construction, Inc., Defendants-Appellants.

Nos. 07-11476, 07-11644, 08-10428 and 08-10433.

May 12, 2010.

J. Stephen Salter, Birmingham, AL, William N. Clark, Gerald L. Miller, Keith Edward Brashier, Glory R. McLaughlin, Redden, Mills & Clark, LLP, Terry W. Gloor, Gloor & Strickland, LLP, O. Douglas Jones, Anil Ashok Mujumdar, Haskell, Slaughter, Young, Rediker, LLC, Joyce White Vance, U.S. Atty., Birmingham, AL, Sam Heldman, The Gardner Firm, Washington, DC, Michael Lawrence Brown, Natalie Cavanaugh Lee, Carrie B. Markham, Robert Parker Hostetter, Kye Gregory Anez Wallace, Alston & Bird, LLP, Janice Singer-Capek, Thompson & Singer, P.A., David H. Flint, Schreeder, Wheeler & Flint, LLP, Atlanta, GA, for Defendants-Appellants.

James J. Fredricks, Andrea Limmer, John J. Powers, III, John P. Fonte, Kristen C. Limarzi, U.S. Dept. of Justice, Washington, DC, for U.S.

Appeals from the United States District Court for the Northern District of Alabama.

Before CARNES, HULL and ANDERSON, Circuit Judges.

HULL, Circuit Judge:

This consolidated appeal arises from five bribery and public corruption cases relating to the $3 billion repair and rehabilitation of a sewer and wastewater treatment system in Jefferson County, Alabama. A 127-count Second Superseding Indictment (the "Indictment") charged sixteen defendants (eleven individuals and five corporate firms) with conspiracy to commit bribery, substantive offenses of bribery, honest services mail fraud, mail fraud, and obstruction of justice. Nine defendants appeal their convictions here. Three of those nine defendants appeal their sentences.

Specifically, the nine defendant-appellants are: two former County officials, three corporate contractors, and four individuals who owned these respective contractors. The two defendant County officials were in charge of the sewer program and received hundreds of thousands of dollars worth of bribes from the defendant contractors. In many cases, the contractors disguised these payments by altering invoices or hiding costs within their accounting systems. In turn, the defendant contractors obtained hundreds of millions of dollars worth of payments on construction and engineering contracts with the County. The County officials approved the contractors' pay requests, change

orders, time extensions, and/or requests for field directives, all of which financially benefitted the defendant contractors.

After review and oral argument, we conclude the evidence at the trials overwhelmingly established the defendant-appellants' guilt, and they have shown no reversible error in the district courts' rulings, pre-trial or in the trials, in the cases consolidated on appeal. Thus, we affirm all of the defendant-appellants' convictions except Roland Pugh Construction, Inc.'s conviction on Count 75, which is barred by the statute of limitations. We also affirm Jewell C. "Chris" McNair's sentence in full. We affirm Jack W. Swann's sentence in part but remand for further proceedings as to the amount of the fine. As to the sentence of Roland Pugh Construction, Inc., we (1) affirm the district court's findings of fact as supported by the record; and (2) conclude there was no error in the district court's calculations under the sentencing guidelines; but (3) in light of the reversal of its Count 75 conviction, we vacate its sentence and remand for resentencing without Count 75.

I. BACKGROUND

A. Jefferson County Officials

The defendant County officials implicated in the bribery scandal are:

> *Defendant McNair*: Jewell C. "Chris" McNair ("McNair") was a Jefferson County Commissioner. McNair was responsible for overseeing the operation of the Jefferson County

Environmental Services Division ("JCESD"), which included the sewer system.[1]

Defendant Swann: Jack W. Swann ("Swann") was the Director of the JCESD.

Defendant Wilson: Ronald K. Wilson ("Wilson") was Chief Civil Engineer for the JCESD and served on the Product Review Committee ("PRC").[2] After leaving the JCESD in 1999, Wilson formed his own firm, Civil Engineering Design Services, Inc. ("CEDS").

Defendant Barber: Clarence R. Barber ("Barber") was Chief Construction Maintenance Supervisor for the JCESD and served on the PRC.

---

[1] The repair and rehabilitation project, which is the subject of this appeal, was required under the terms of a consent decree between Jefferson County and the U.S. Environmental Protection Agency. The consent decree was entered into as a settlement of claims brought by the U.S. Justice Department in 1994 against Jefferson County for violations of the Clean Water Act, and it required Jefferson County to repair and upgrade dilapidated sewer lines and wastewater treatment plants that were overflowing and leaking sewage into local watersheds. The JCESD initially estimated the work would cost County ratepayers $1.2 to 1.5 billion over the next decade. The actual costs were closer to $3 billion.

[2] The PRC was a technical committee that reviewed materials, specified the products that could be used on the sewer project, and qualified contractors for certain kinds of work on the project. During the relevant time period, the PRC had between 10 and 11 members. Among them were defendants Wilson and Barber, and co-conspirators Harry Chandler, Donald Ellis, and Larry Creel.

B. Contractors

These defendant corporate firms and individuals had either construction or engineering contracts with the JCESD and were implicated in the bribery scandal.

Pugh defendants: Roland Pugh Construction, Inc. ("PUGH"); Grady Roland Pugh, Sr. ("Roland Pugh"), founder, board chairman, and 70% owner of PUGH; and Joseph E. "Eddie" Yessick ("Yessick"), President and 10% owner of PUGH. PUGH had $178 million in sewer construction contracts with Jefferson County between August 1999 and January 2002. PUGH was a "dig-and-replace" contractor.[3]

Rast defendants: Rast Construction, Inc. ("RAST"); Bobby J. Rast ("Bobby Rast"), President and co-owner of RAST; and his brother Daniel B. Rast ("Danny Rast"), Vice President and co-owner of RAST. RAST had about $100 million in sewer construction contracts with Jefferson County during the same period. RAST was another "dig-and-replace" contractor.

---

[3] A "dig-and-replace" contractor traditionally digs up broken sewer pipes, replaces them, and paves over the repair. Some dig-and-replace contractors have the capacity to perform "cured-in-place" work. The "cured-in-place" process involves the relining of cracked pipes with a cement product that cures inside the pipes and seals the cracks from within. None of the defendants here performed cured-in-place work. However, PUGH and Defendant Rast Construction, Inc. entered into joint ventures with contractors who could perform cured-in-place work, as discussed later.

Dougherty defendants: F.W. Dougherty Engineering & Associates, Inc. ("FWDE") and Floyd W. "Pat" Dougherty ("Dougherty"), President and owner. FWDE received $11.4 million in no-bid engineering contracts with Jefferson County during the same period.

USI defendants: US Infrastructure, Inc. ("USI"); Sohan Singh ("Singh"), President of USI; and Edward Key ("Key"), Vice President of USI. USI received about $50 million in engineering contracts with Jefferson County between 1999 and 2003.

C. Co-conspirators

Five other individual co-conspirators pled guilty and testified for the government in one or more of the five trials:

Grady Pugh: Grady Roland Pugh, Jr. ("Grady Pugh") was CEO and 10% owner of PUGH. He is the defendant Roland Pugh's son.

Chandler: Harry T. Chandler ("Chandler") was Assistant Director of the JCESD and served on the PRC.

Ellis: Donald R. Ellis ("Ellis") was an engineer for the JCESD and Chairman of the PRC.

Creel: Larry P. Creel ("Creel") was a Maintenance Supervisor for the JCESD and served on the PRC.

Dawson: William H. Dawson ("Dawson") was the owner of Dawson Engineering, Inc. ("Dawson Engineering"), which received at least $20 million worth of no-bid engineering contracts from Jefferson County.

While the Indictment alleges certain conduct by these five individuals as co-conspirators, they are not named defendants in the Indictment at issue in this appeal.

D. The Indictment

The Indictment contained 127 counts.[4] Six of the counts charged a bribery conspiracy. Specifically, Counts 1 (against McNair and the Pugh, Rast, and Dougherty defendants), 32 (against McNair and the USI defendants), 50 (against McNair and the USI defendants), 51 (against Swann and the Pugh, Rast, and Dougherty defendants, except for Roland Pugh), 75 (against Wilson and PUGH), and 78 (against Barber and the Pugh defendants) charged conspiracy to commit bribery under 18 U.S.C. §§ 371 and 666.

---

[4] The original indictment was filed on February 7, 2005, and the Superseding Indictment was filed on July 13, 2005. After the five co-conspirators listed above pled guilty over a period of several months, the government submitted the Second Superseding Indictment on August 26, 2005, dropping the defendants who had pled guilty. The counts referenced in this opinion are as numbered in the Second Superseding Indictment.

Counts 2-31, 33-49, 52-74, 76-77, and 79-89 charged one or more defendants with substantive bribery offenses (or aiding and abetting bribery) under 18 U.S.C. § 666. For the most part, these substantive bribery offenses were the overt acts charged in the conspiracy counts.

Counts 90-101 charged honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 against defendants Swann, Yessick, and PUGH. Counts 102-121 charged honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 against defendants Swann, Wilson, CEDS, FWDE, and Dougherty. Counts 122-124 charged mail fraud under 18 U.S.C. § 1341 against the Dougherty defendants. Counts 125-127 charged obstruction of justice against certain defendants under 18 U.S.C. § 1503.

Some of these counts were dismissed before trial, and other counts were dismissed prior to jury deliberations. And some defendants, such as Roland Pugh, were dismissed from some of the counts that went to the jury. This opinion addresses only the counts that were actually submitted to the jury.

E. Five Trials

The 127-count Indictment was severed into five separate cases for trial: *McNair* (05-061), *Swann* (05-544), *Barber* (05-542), *Wilson* (05-545), and *USI*

(05-543).[5] The *McNair* trial involved bribes by the Pugh, Rast, and Dougherty defendants primarily to McNair but also to Chandler and Ellis. The *USI* trial involved bribes to McNair by the USI defendants. The other trials involved bribes to Swann, Barber, and Wilson, respectively.

In the *USI* trial, defendants USI, Key, and Singh were convicted of, among other things, conspiracy to commit bribery and substantive bribery offenses for making payments to defendant Commissioner McNair and the JCESD's Chandler and Ellis. This Court affirmed defendants USI, Key, and Singh's convictions and sentences in *United States v. US Infrastructure,* 576 F.3d 1195 (11th Cir.2009), *cert. denied,* ___ U.S. ___, 130 S.Ct. 1918, 176 L.Ed.2d 368 (2010). Defendant McNair entered a conditional guilty plea to Count 32 (conspiracy to accept a $140,000 bribe from the USI defendants).[6] McNair reserved the right to appeal the district court's denial of his motion to dismiss Count 32. McNair's appeal in

---

[5] Grady Pugh, Chandler, Ellis, Dawson, and Creel testified for the government in the *McNair* trial. Chandler, Ellis, and Wilson testified for the government in the *Swann* trial. Grady Pugh, Chandler, and Yessick testified for the government in the *Barber* trial. Grady Pugh and Chandler testified for the government in the *Wilson* trial. Chandler, Ellis, and Dawson testified for the government in the *USI* trial.

[6] McNair's motion to dismiss sought dismissal of Counts 32 and 50 (both counts of conspiracy to commit bribery), arguing under "Wharton's Rule" that a conspiracy cannot exist as an offense separate from the substantive offense of bribery (charged in Counts 33-37).

the *USI* case has been consolidated with the present appeal.

F. Nine Parties to This Appeal

This present consolidated appeal involves not only defendant McNair's appeal in the *USI* case but also these defendants' appeals in the other four trials:

> (1) *McNair trial*: defendants McNair, PUGH, Roland Pugh, RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty. Defendant Yessick (President of PUGH) was convicted at trial and does not appeal.
>
> (2) *Swann trial*: defendants Swann, PUGH, RAST, Bobby Rast, FWDE, and Dougherty. Defendant Yessick was convicted at trial and does not appeal.
>
> (3) *Barber trial*: defendant PUGH. Defendants Barber and Yessick pled guilty and do not appeal.
>
> (4) *Wilson trial*: defendant PUGH. Defendant Wilson was convicted at trial and does not appeal.

Albeit from five separate cases, the defendant-appellants raise many of the same issues. We discuss (1) the evidence in the *McNair, Swann, Barber,* and *Wilson* trials, and (2) the issues commonly raised by the defendants, followed by (3) certain issues pertaining to particular defendants.

II. THE *McNAIR* TRIAL (05-061)

The *McNair* trial, held from April 6 to 21, 2006, involved over $350,000 in bribes the Pugh, Rast, and Dougherty defendants paid to Commissioner McNair and $6,600 in bribes they paid to County employees Chandler and Ellis. The government called 36 witnesses, including Chandler, Ellis, Dawson, Creel, and Grady Pugh. The defense called 23 witnesses. No named defendant testified.

The government's witnesses described in great detail the bribes to McNair, Chandler, and Ellis, and how those three County officials financially helped the Pugh, Rast, and Dougherty defendants in their contracts with and payments from Jefferson County. Because the defendant contractors in the *McNair* trial claimed they paid McNair only out of a long-time friendship and lacked corrupt intent, the district court admitted certain evidence, under Federal Rule of Evidence 404(b), about how these same defendants bribed Swann and other County employees in order to show the defendants' corrupt intent and common plan. Thus, our recitation of evidence in the *McNair* trial covers bribes given not only to McNair but also to Swann and other County employees.

A. McNair Helps Contractor-Defendants

Jefferson County was governed by five elected Commissioners, each of whom had a different area of responsibility. Defendant McNair held office as a County Commissioner from 1996 until his retirement

in March 2001. McNair was responsible for overseeing the JCESD, which included the sewer systems. McNair had authority to approve pay requests from the sewer construction contractors, to approve change orders[7] increasing the contract price paid to those contractors, to approve change orders modifying the contract terms in favor of those contractors, to approve emergency payments to contractors, to select consulting engineers through a no-bid process, and to approve the engineers' contracts and payments. Although final approval required the vote of the entire Commission, there was no evidence that the Commission questioned or disapproved of any pay request or change order approved by McNair or any selection or award of a contract recommended by McNair. McNair's nickname among the contractors was "Big Man."

McNair approved payments (in the hundreds of millions of dollars) to the Pugh, Rast, and Dougherty defendants (the "contractor-defendants"), approved change orders (in the millions of dollars) benefitting PUGH and RAST, and approved no-bid engineering contracts (in the millions of dollars) to FWDE, all while these defendants were paying for materials and labor to expand and renovate McNair's photography studio. Each item requiring Commission approval, such as contract awards or modifications, needed

---

[7] Change orders are contract modifications in the Jefferson County Commission's Agenda items.

McNair to approve it first and then to put it on the Commission's agenda for further approval.[8] The sewer construction contracts were awarded through a sealed bid process and would go to the lowest bidder. But the prospective contractors had to satisfy technical standards set by the PRC before they would be eligible to bid.

Once a new contract was awarded and in place, Chandler and other supervisors, such as Ellis, could approve changed or additional work as "field directives." If a requested change exceeded the original contract amount, Chandler and Ellis could recommend "change orders" (requests for additional funds), which McNair would then approve and place on the Commission's agenda, without further competitive bidding. The JCESD also could award "emergency" work to construction contractors without competitive bidding. For emergency jobs, Barber typically selected the contractor, negotiated the price, and then sent the

---

[8] For example, the December 1999 Commission Agenda shows a modification adding $1,081,621 (about 28% of the contract value) to a PUGH contract, and a $112,600 contract award to FWDE. The January 2000 Agenda indicates a modification adding $489,133 to a PUGH contract. The February 2000 Agendas indicate a modification adding $400,724 to a RAST contract, a $721,132 contract award to FWDE, and a modification adding $1,377,267 to a PUGH contract. The March 2000 Agenda indicates a $5,289,002 contract award to PUGH. The April 2000 Agenda indicates contract awards of $994,640 and $348,103 to FWDE, a modification adding $439,722 to a RAST contract, and a modification adding $850,264 to a PUGH contract.

pay requests to McNair, Swann, and Chandler for approval. Together, McNair, Swann, and Chandler approved a variety of contracts for the sewer project.[9]

The construction contractors' work was supervised by independent consulting engineers, whose jobs were to make sure the contractors performed according to specifications and to sign off on payments and requests for change orders. This supervision was provided by engineering firms such as FWDE, USI, and Dawson Engineering. The engineering consultant contracts were awarded without bidding. Swann and Chandler selected engineering firms, negotiated their contracts, and recommended them to McNair for final approval.

The County's PRC initially decided to qualify only three contractors to do "cured-in-place" work: W.L. Hailey ("Hailey"), Insituform, and Reynolds. Because the traditional "dig-and-replace" work was grouped with "cured-in-place" work for all the major construction contracts, this PRC decision effectively limited the "big jobs" to only three bidders: a RAST – Hailey joint venture, a PUGH – Insituform joint

---

[9] For example, Chandler, Swann, and McNair approved a $1,168,788.02 payment to PUGH for work done in January 2001. Chandler, Swann, and McNair approved a $2,652,820 payment to PUGH for work done in June 2000. Chandler, Swann, and McNair approved a $1,000,000 payment to RAST in October 2000. Swann and McNair approved – in one day on an emergency basis without Chandler's or the County engineer's usual approval – a $1,152,888 payment to RAST for work done in October 2000.

venture, and Reynolds, which did its own dig-and-replace work. In late 1999, the PRC changed the criteria, making it more difficult for other contractors to pre-qualify for "cured-in-place" work, and potentially delaying by two years the qualification of otherwise qualified contractors.[10]

Contractor PUGH's CEO Grady Pugh admitted to receiving a "general benefit" from giving McNair "envelopes of cash," in that "Jefferson County treated us real well. We had an opportunity to do a tremendous amount of work there. The work that we did there generated huge profits . . . [I]t took our company [PUGH] from a normal struggling contracting company in [the] mid to late '90s, to a thriving, wealthy, strong construction company."

During the relevant period, PUGH dedicated about 70% of its work to the Jefferson County sewer rehabilitation and received tens of millions of dollars in revenue from that sewer work. In 1996 and 1997, at the sewer rehabilitation's outset, PUGH made gross profits of 10%, and as the project continued and payments were made to JCESD officials, the company's sewer rehabilitation profits increased to 50% in 1999, 40% in 2000, and 45% in 2001, making PUGH tens of millions of dollars each of these years.

---

[10] The PRC and its requirements are discussed more later in the *Wilson* trial section.

RAST also received tens of millions of dollars in revenue per year from its Jefferson County sewer work. And the engineering firms, including FWDE, received revenue in millions of dollars per year from their work on the sewer rehabilitation. McNair made the decision every time FWDE or Dawson Engineering was selected as the outside consulting engineer and awarded a professional service contract. After electrical contractor Gus Henson did some work for McNair without charge, McNair had Swann arrange a County contract for him, even though the County did not normally hire electrical engineers for sewer work.

In total, from August 1999 to January 2002, Jefferson County paid $178 million to PUGH, $100 million to RAST, $11.4 million to FWDE, and $8 million to Dawson Engineering.

B. Bribes of McNair

McNair owned a small photography business called McNair Frame & Photo Art, Inc. ("McNair's studio"). Between 1999 and early 2002, McNair started a major expansion and renovation of the studio, which would more than double its size. McNair's expansion included adding extras to the studio, such as an apartment for his daughter, a second-story deck, external stairs, a "guard shack," and a security gate.

All contractor-defendants in this case generously contributed to the renovation and expansion of

McNair's studio. In 1999, FWDE's President Dougherty sent Bill Bailey, an FWDE employee initially hired as an inspector for County jobs, to work as the construction superintendent for the studio's renovation. FWDE paid Bailey for the approximately 18 months he spent working at McNair's studio. During that time, FWDE paid Bailey $74,240. Although some of his time was charged to "administration," FWDE President Dougherty charged some of Bailey's studio time to a JCESD sewer project. McNair was not charged for Bailey's work. As superintendent, FWDE's Bailey oversaw construction at McNair's studio by numerous other contractors, including PUGH and RAST.[11]

RAST excavated for the expansion's footings for McNair's studio. In July 1999, PUGH ordered concrete and for four weeks had a four-man crew pour concrete walls and do other work on the studio, paying the crew $11,709. PUGH's crew supervisor talked to McNair while the concrete work was in progress, but McNair did not question why he was there or where he was from, nor did McNair offer to pay for this work.

---

[11] As 404(b) evidence, the government showed that in addition to paying $74,240 to Bailey, FWDE paid the salaries of its employees, Wayne Hendon and John Stanger, while they acted as construction superintendents overseeing renovation of JCESD Director Swann's home. FWDE paid Hendon $94,090 and Stanger $28,839 for that work.

In late 1999, FWDE's Bailey asked Barry Mosley of Mosley Construction to do wood framing and other finish work at McNair's studio. McNair initially paid Mosley, first with a check and then with cash, but eventually McNair stopped paying. Bobby Rast then told Bailey that "McNair was running out of funds" and that RAST would begin paying Mosley directly. From July 2000 to December 2000, RAST wrote 20 checks totaling $52,990 to Mosley as his work at the studio progressed, and, at Bobby Rast's direction, coded these payments as expenses on a JCESD sewer project. Either Bailey or someone from RAST's office, such as Danny Rast, brought Mosley the checks.

In January 2002, RAST gave Mosley two more checks totaling $7,200 for work he and his crew did on the studio's "guard shack," a two-story, 12 x 12 building designed by defendant Dougherty, and built, in part, by defendants RAST and FWDE. Bobby Rast caused these payments to be coded as expenses on the "Upper Valley Rehab" or Kilsby contract, a JCESD sewer project. For tax purposes, all payments to Mosley were deducted as business expenses on sewer projects. Mosley did no work on those projects. After a local newspaper reported RAST's construction work at JCESD Director Swann's home, RAST amended its tax returns for 1998-2000 and 2002 to eliminate these and other deductions. The deductions, which totaled over $140,000, were based on expenditures for McNair's studio and Swann's home that had been cost-coded to sewer projects and treated as business expenses.

After the publicity, Bobby Rast told his bookkeeper in "effect that we really didn't need any document invoices in the files with Jack Swann's or Chris McNair's shipping address on them." The bookkeeper then located and discarded several invoices related to work at McNair's studio and Swann's home.

RAST furnished the labor and PUGH furnished the materials to construct a second-story deck for the rear of McNair's studio. Bailey handwrote a list of materials and ordered the necessary steel. When Besco Steel Supply ("Besco") delivered the steel, its delivery tickets identified PUGH and Yessick as its customers and indicated some of the steel was for the Valley Creek Treatment Plant, a JCESD sewer job on which PUGH was the contractor and FWDE the consulting engineer. In September 2000, PUGH paid Besco and charged the JCESD for $3,773 worth of steel with FWDE's approval, and RAST poured the concrete deck and stairs, set the handrails, and built the steps.

Around September 2000, FWDE employee Dave Bechtel ordered two sets of aluminum handrails for the studio deck and a staircase from Thompson Fabricating, which was directed to bill PUGH. The $5,500 invoice for the first set of handrails charged the work as performed on the Valley Creek Treatment Plant and falsely indicated that the handrails were shipped there. In February 2001, an $11,700 invoice for the second set of handrails referenced "CHRIS MC." as the customer, but also falsely indicated that

the handrails were shipped to Valley Creek when in fact they were shipped to McNair's studio. PUGH paid both invoices and billed the County for the first set of handrails after adding a markup and charges for labor and equipment. RAST installed the handrails.

In May 2000, at McNair's request to Roland Pugh, Grady Pugh flew McNair's daughter and FWDE's Bailey on PUGH's airplane to Georgia, where they picked out carpet for McNair's studio. Before take-off, Roland Pugh told his son Grady Pugh that "McNair has called [again] and says that he's broke and he doesn't have enough money to leave for the deposit on the carpet" and "[s]o, if you would, write a check for the deposit." Grady Pugh paid the deposit with a $4,820 PUGH check made out to the Mill Store and had it treated on PUGH's books as an expense on the "last rehab contract."[12]

FWDE's Bailey hired subcontractor Clint Gilley to install the carpet at McNair's studio. In October 2000, FWDE's Bailey called RAST to request checks for subcontractor Gilley. After Bobby Rast was

---

[12] The Indictment alleges as an overt act on Count 1: "On or about May 24, 2000, Defendant ROLAND PUGH instructed Grady Pugh to fly an airplane owned by Defendant PUGH, INC. to LaGrange, Georgia, to buy carpet and flooring material for the benefit of Defendant McNAIR. . . . On or about May 24, 2000, Defendant ROLAND PUGH caused Grady Pugh to pay $4,820 to The Mill Store, Inc. for carpet and tile for installation at McNair Studio for the benefit of Defendant McNAIR."

consulted, RAST gave Gilley two checks totaling $5,301 for his work at McNair's studio.

In addition to paying for materials and providing work crews, PUGH also made other contributions to McNair's studio. When the project began in 1999, Roland Pugh told PUGH's other three owners, Grady Pugh, Andy Pugh, and Yessick, they had to give money to McNair because he was building a studio and, as 10% owners of the PUGH company, they had to "kick in" their share. Grady Pugh gave approximately $1,500 in cash to Roland Pugh's secretary that time.[13]

---

[13] The government also presented evidence of cash allegedly given to McNair. Roland Pugh collected money from the other owners to give to McNair. On July 18 and 19, 2000, Roland Pugh, Grady Pugh, and Yessick wrote checks to cash (totaling $9,000) in proportion to their ownership interests. Roland Pugh gave Grady Pugh an envelope of money and asked him to give it to McNair. Grady Pugh took the envelope to the studio where he saw Bailey and told him he was there to help McNair. Grady Pugh stated the money was "financial help" that McNair needed at that time. Grady Pugh then met with McNair for a few minutes and left the envelope with McNair.

> When the studio needed an air conditioning system, McNair again called Roland Pugh asking PUGH to pay for it. Roland Pugh told Grady Pugh that McNair needed $40,000, but that "y'all don't have to put up any money this time, I'm going to do it in a different way." Roland Pugh gave a $10,000 check dated December 22, 2000 to Grady Pugh's wife, Genae Pugh, who cashed it and gave the money to Roland Pugh. That same day, Roland Pugh wrote a $10,000 check to Angie Pugh (Andy Pugh's wife) and a $9,750 check to

(Continued on following page)

McNair also wanted a security gate for the studio. In August 2000, Danny Rast hired subcontractor Master Access Controls ("MAC") to install an electronic gate and agreed that RAST would provide the electrical conduit, wiring, and concrete pad for the gate's motor. MAC met with FWDE's Bailey at McNair's studio site, installed the gate, and sent its invoices to the attention of Danny Rast. RAST paid the subcontractor $5,866.92. McNair paid nothing.

Also in December 2000, at Danny Rast's request, RAST gave Bailey & Sons' Bobcat Service, owned by Danny Bailey, a $5,500 check for landscaping at McNair's studio. However, RAST's records indicated Danny Bailey was working on a JCFSD sewer project. Although Danny Bailey had done work for RAST before, he did not send the invoice for the studio work through regular billing, as he normally would, but instead sent it "Atten Dan Rast."[14]

---

cash. A week earlier Roland Pugh had written a $9,000 check to cash. Around Christmas 2000, at Roland Pugh's request, Grady Pugh picked up another envelope containing cash from Roland Pugh's secretary, went to McNair's house, spoke with him for a few minutes, and put the money down on a couch with McNair watching.

It appears from the closing arguments that all of the above cash and checks relate to Counts 4, 13 and 14 (on which the defendants were acquitted).

[14] Huffman Electric was hired to do electrical work at McNair's studio by FWDE but was told to bill RAST. When Huffman sent an $11,252 invoice to RAST in November 1999

(Continued on following page)

In November 2000, McNair asked Dawson Engineering to contribute to the studio's renovation. After McNair called William Dawson, the founder of Dawson Engineering, the two met at McNair's studio. McNair handed Dawson a brochure for an audiovisual system and told Dawson that, while McNair had "never asked [Dawson] for anything before," he needed to ask Dawson to "help [him] with something." McNair opened the brochure to a specific page, showed it to Dawson, and indicated he wanted Dawson to pay for the equipment and its installation. Dawson went to Holt Audio Video ("Holt") and purchased the equipment for $16,400. Dawson testified he would not have done this for McNair if McNair had not been associated with the sewer rehabilitation process. When Dawson saw the invoice indicated the bill was for Dawson Engineering but the shipment was for McNair's studio, he became "uncomfortable with the whole situation" and asked Holt to alter the shipping information by putting a sticker over the McNair studio's address, which Holt did. Dawson later pled guilty to conspiring to commit bribery.

---

without making it to the attention of Bobby or Danny Rast, RAST's vice president, Roy Weaver, responded that they "have no job at this location." Huffman then began billing McNair directly. At first McNair paid the bills, but he eventually fell behind in his payments and owed approximately $45,000 by July 2000. Around this time, Grady Pugh allegedly made a delivery of cash to McNair, and RAST took over paying for Mosley's wood framing services.

Work at the studio continued after Commissioner McNair retired in March 2001. FWDE's Bailey hired Buchanan Plumbing and Sewer Service ("Buchanan") to plumb the "guard shack." In November 2001, FWDE employees signed Buchanan's $1,775 in invoices and sent them to RAST, which paid them. RAST recorded the payments as "Plumbing Work at Kilsby Circle," a sewer project, even though Buchanan never did any work there.

After McNair's retirement, Roland Pugh told Grady Pugh "that GD [sic] McNair has called again, and he wants us to do some work over in Arkansas" and "surely this is the last time we'll have to do anything for him since he's out of office." Grady Pugh flew with McNair to Arkansas to look at the site and plans. Following this visit, PUGH's Yessick hired George Word, an Arkansas building contractor, in August 2001 to build a 3,000-square-foot retirement home for McNair. Both PUGH and FWDE paid for its construction.[15] PUGH's checkbook carried the

---

[15] After McNair's retirement, PUGH paid George Word $44,192.75 in the first half of October 2001, and, at Yessick's instruction, internally charged the expense to miscellaneous jobs/construction materials. McNair told George Word that FWDE would make the next payment. On October 24, 2001, after FWDE's bookkeeper Rick Brinson saw Dougherty speaking with McNair in FWDE's parking lot, Dougherty asked the bookkeeper to write a $50,000 check to a construction company. About 20 to 30 minutes later, George Word's $50,000 invoice, dated a day earlier, arrived by fax. The bookkeeper wrote the check, gave it to Dougherty, and made an extra copy of the paperwork and kept it at home. Upon being subpoenaed for

(Continued on following page)

notation "Gift per Eddie [Yessick]. No job." After McNair's retirement, RAST also continued to perform work at McNair's studio and paid $8,135.78 for McNair and his wife to take a cruise to Alaska in September 2001.[16]

C. Bribes of Chandler and Ellis

The Pugh, Rast, and Dougherty defendants also gave, at no charge, goods, services, labor, materials, and other things of value to (1) JCESD Assistant Director Chandler, and (2) JCESD Engineer and PRC Director Ellis. At a lunch, PUGH's President Yessick offered to landscape Chandler's home. Chandler at first refused, but weeks later Yessick offered again, and Chandler accepted. PUGH provided crews and paid for the materials for the extensive landscaping, including grading, drainage work, and new sod, as well as construction of a patio, walkway, and retaining walls. Chandler paid nothing for that work.

In October 2001, Yessick arranged and paid for a $610 condo rental for the Chandler family vacation at

---

these records later, the bookkeeper searched FWDE's records, but could not find the invoice. The only copy he found was the extra one he kept at home.

[16] After McNair's retirement, on May 14 and 15, 2001, PUGH, FWDE, and Bobby Rast each gave McNair a check for $5,000 (totaling $15,000). Bobby Rast's check was for a "retirement gift" and FWDE's was for a "motor home."

the Pelican Beach Resort in Destin, Florida.[17] Chandler asked for, and PUGH delivered, a load of sand for Chandler's house for free.

In the spring of 2002, Chandler asked Bobby Rast to help with his expenses for a trip to Europe to attend technical conferences. Ellis planned to attend too. At RAST's office, Bobby Rast gave Chandler an envelope containing $5,000 in cash and told Chandler to split the money with Ellis. Chandler had expected $250 to $500 and was "uncomfortable and thought about giving it back, but [he] didn't." Instead, Chandler "eventually gave half" to Ellis.[18] The Dougherty defendants also gave Chandler tickets to Disney World and a trip to San Antonio.

D. The Defense

For the most part, the defendants did not dispute that they provided, at no charge, these goods, services, labor, materials, and other things of value to

---

[17] The government also presented evidence that in April 2000, PUGH's Yessick invited Chandler on a fishing trip to Bienville Plantation in Florida, where the trip was paid for by PUGH. Grady Pugh arranged to have Yessick and Chandler fly to Florida in the PUGH company's airplane. The jury acquitted PUGH and Yessick on Count 70, which referenced this trip.

[18] Other JCESD employees also received cash from the contractors. Danny Rast gave $1,500-$2,000 in cash to JCESD Field Supervisor Larry Creel, who sometimes awarded emergency work. PUGH gave $500 in cash to Creel for airplane tickets after Creel asked for a flight on PUGH's company airplane.

Commissioner McNair.[19] Instead, the defendants argued they lacked the "corrupt" intent necessary for bribery and that the government had failed to prove the required *quid pro quo* for the benefits provided to McNair. The defendants also asserted they helped McNair based on their friendship with him or for goodwill. In support, defense witnesses testified to McNair's decades-long friendship with Roland Pugh, Dougherty, and the Rast family, and described how the contractor-defendants frequently performed work for McNair at no charge. The contractor-defendants also contended their experience, skills, and business reputation were strong enough so that they did not need to resort to bribery to win County contracts.

The defense spent considerable time attacking the credibility of Grady Pugh, including inconsistencies in his testimony. The defense suggested he was lying out of hatred for his father Roland Pugh and to obtain a favorable sentence recommendation from the government.

The government countered the defendants' corrupt-intent arguments by offering 404(b) evidence of similar items of value the same contractors had provided for Swann, Wilson, and Barber (who were not defendants in the *McNair* trial). The government argued the large scale and overall pattern of these payments were inconsistent with the defendants'

---

[19] Roland Pugh is the only defendant to dispute that he gave anything to McNair.

claims that they were favors undertaken merely out of friendship for McNair. The government also presented evidence that McNair made numerous unexplained cash deposits.[20]

E. Jury's Verdicts

Before sending the case to the jury, the district court dismissed several substantive counts that charged bribes to McNair after his retirement in March 2001, and struck the corresponding overt acts from the conspiracy count (Count 1), reasoning that 18 U.S.C. § 666 (the bribery statute) could not apply when McNair was no longer a public official.

In the *McNair* trial, the jury convicted defendants McNair, PUGH, Roland Pugh, Yessick, RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty on Count 1 of conspiring to bribe McNair. Count 1 alleged 54 overt acts originally. Several overt acts were dismissed pre-trial, but Count 1, as submitted to the jury, charged 39 overt acts in furtherance of the conspiracy.

As to bribes by the Pugh defendants, the jury convicted defendant McNair on these substantive bribery counts: 2 ($5,500 for hand railings) and 3

---

[20] In the *McNair* trial, the government did not explain the source of the cash deposits. But in the *USI* case, the government showed these cash deposits corresponded with cash withdrawals from USI, Singh, and Key. *See US Infrastructure*, 576 F.3d at 1206.

($11,700 for hand railings). The jury convicted defendant PUGH on Count 15 (same hand railing facts as Counts 2 and 3). The jury convicted defendants PUGH and Yessick on Count 71 ($610 for Chandler condominium rental).

As to bribes by the Rast defendants, the jury convicted defendant McNair on these substantive bribery counts: 5 ($52,990 for carpentry work by Barry Mosley), 6 ($5,866 for security gate installation by Master Access Controls), 7 ($5,300 for carpet installation by Clint Gilley), 8 ($5,500 for landscaping work by Bailey & Sons), 9 (several thousand dollars for fabrication and construction of stairs), and 10 (several thousand dollars for concrete deck construction). The jury also convicted defendants RAST and Bobby Rast on Counts 19-22 (same facts as Counts 5-8, respectively), 72 ($2,500 cash to Chandler by RAST and Bobby Rast), and 87 ($1,000 cash to Ellis by RAST and Bobby Rast). RAST was also convicted on Counts 23 (same facts as Count 9) and 24 (same facts as Count 10). The jury convicted defendant Danny Rast on Counts 19, 20, and 22 (same facts as Counts 5, 6, and 8).

Defendant McNair was also convicted on Counts 11 ($27,434 by the Dougherty defendants for project management and supervision by Bailey) and 12 ($16,400 by Dawson for installation of audio visual

system). The jury convicted defendants FWDE and Dougherty on Count 28 (same facts as Count 11).[21]

In summary, the jury convicted defendant McNair on the bribery conspiracy count and ten substantive bribery counts. The jury convicted defendants PUGH, Roland Pugh, and Yessick on the bribery conspiracy count; defendant PUGH on two substantive bribery counts; and defendant Yessick on one substantive bribery count. The jury convicted defendants RAST, Bobby Rast, and Danny Rast on the bribery conspiracy count; defendant RAST on eight substantive bribery counts; defendant Bobby Rast on six substantive bribery counts; and defendant Danny Rast on three substantive bribery counts. The jury convicted defendants FWDE and Dougherty on the bribery conspiracy count and on one substantive bribery count each. All defendants but Yessick appeal all conviction counts.

---

[21] In the *McNair* trial, the jury acquitted defendant McNair on Count 4 ($30,000 cash from the Pugh defendants), defendants PUGH and Yessick on Count 13 ($20,000 cash to McNair) and on Count 70 ($1,000 trip for Chandler to Bienville Plantation, Florida), and defendants PUGH and Roland Pugh on Count 14 ($10,000 cash to McNair). The $30,000 in Count 4 appears to consist of the cash in Counts 13 and 14.

> The *McNair* jury also acquitted defendant Danny Rast on Count 21 ($5,300 bribe of McNair for carpet installation through Clint Gilley), defendants RAST and Danny Rast on Count 89 ($1,000 cash to JCESD employee Larry Creel), and defendants RAST and Bobby Rast on Count 126 (obstruction of justice in connection with withholding items from the grand jury).

III. THE *SWANN* TRIAL (05-544)

The *Swann* trial, held from September 19 to October 2, 2006, involved more than $330,000 in bribes paid to County employee Swann by the Pugh, Rast, and Dougherty defendants. The government called 25 witnesses, including Wilson, Chandler, and Ellis. The defense called 20 witnesses, including Grady Pugh. No named defendants testified except for Swann.

The government's witnesses described in great detail the bribes to Swann and how Swann financially helped the Pugh, Rast, and Dougherty defendants in their contracts with and payments from Jefferson County. And to counter the defendants' lack-of-corrupt-intent defense, the government introduced 404(b) evidence describing bribes that the same Pugh, Rast, and Dougherty defendants gave to McNair, Barber, Wilson, and Chandler.[22]

A. Swann Helps Contractor-Defendants

JCESD Director Jack Swann reported directly to Commissioner McNair. It was Swann's responsibility to implement the EPA consent decree, which included recommending engineering firms to McNair and negotiating the scope and price of no-bid engineering

---

[22] For example, in the *Swann* trial, the government presented evidence about how RAST bought Barber a piece of land. This evidence is outlined later in this opinion under the *Barber* trial evidence. Defendant Barber pled guilty to this charge.

contracts, such as with FWDE. Swann supervised the sewer work and made recommendations to McNair for payment approvals and change orders. Swann also was able to grant time extensions and field directives that greatly benefitted RAST and PUGH.

For example, in May 1998, the JCESD awarded the Vestavia Trunk Sewer Replacement project to PUGH. PUGH's failure to meet the project's May 17, 2000 completion date would trigger a liquidated damages clause, obligating PUGH to pay $1,000 per day. In March 2000, PUGH was running far behind schedule on this project and requested a 120-day extension to the May 17 completion date. Swann initially denied PUGH's request.

On June 13, 2000, PUGH renewed its request, this time for a 180-day extension. On July 10-five days after PUGH's Yessick hired Guthrie Landscaping ("Guthrie") to landscape Swann's property – Swann granted PUGH's request for a 180-day extension to the May 17 completion date. Swann's extension saved PUGH $180,000 in potential liquidated damages.

In July 2000, the JCESD awarded the Valley Creek Trunk Relief Tunnel project (designed by FWDE) to RAST and its joint venture partner W.L. Hailey. In December 2001, during the first phase of the project, RAST's tunnel-boring machine became stuck in the ground. An independent engineer concluded the machine became stuck because RAST may have discounted certain information in a geotechnical

survey. And the JCESD's supervising engineer faulted RAST for using "the wrong machine." Nevertheless, Swann authorized RAST to remove the machine at a cost of $2.6 million to Jefferson County.

Further, Swann declined to invoke the performance bond against RAST, which would have guaranteed the project's completion at the original contract price of $27.8 million. Instead, RAST won a re-bid for an additional contract worth $23.8 million. Consequently, the County effectively paid RAST over $50 million for work RAST was obligated to perform under the original $27.8 million contract.

Swann also approved a lucrative field directive that benefitted PUGH ($827,417) and three that benefitted RAST ($2,020,367). Although in the County's internal accounting system Swann recorded the County's payments to the RAST-Hailey joint venture for each of these field directives as payments for the Valley Creek Tunnel Relief project, none of the field directives involved work on that project. Swann also exercised great influence over the selection of engineers, like FWDE.

B. Bribes of Swann

In 1998, Swann and his wife Nila purchased a house two doors down from their own residence. The Swanns lived in their residence while they renovated their new home. Between September 1998 and June 2002, the Swanns put over $600,000 worth of additions and improvements into their new home. FWDE,

RAST, and PUGH provided Swann, at no charge, more than $330,000 in goods, services, labor, and materials for that work. For certain improvements paid for by FWDE, Swann admitted he did not reimburse FWDE or Dougherty. As they had done for the McNair studio project, the contractor-defendants worked together on Swann's new home. While the work was going on, Swann periodically came over to observe the work at the new home. While Swann was recommending and approving JCESD actions worth millions of dollars, the contractor-defendants were providing hundreds of thousands of dollars in materials and services to renovate and expand Swann's new home.

Specifically, in the fall of 1998, Dougherty sent FWDE supervisors Wayne Hendon and Bill Bailey to meet with Swann and his wife about plans to remodel their new home. Over the course of the three-year project, FWDE employees continually supervised the remodeling of the new home. From about October [illegible] to March 2001, FWDE paid employee John Stanger $28,839 for his work at Swann's home. During that time period, FWDE's Hendon spent half of every work day supervising other contractors at Swann's home and billed his time as a nonpaying job. FWDE paid Hendon $94,090 for his work at Swann's home. In the fall of 1998, FWDE hired subcontractor Dudley Davis for framing, costing over $28,000. Dougherty visited the site periodically.

In the winter of 1999, Bobby Rast sent RAST superintendent Luke Cobb to supervise RAST crews

who did demolition work and poured concrete for Swann's new home. Bobby Rast had RAST employee Derek Houston serve as a point of contact for RAST's suppliers and subcontractors for Swann's home and paid Houston $6,300 for his work there. In 2000, RAST paid its employees $18,867.20 in miscellaneous labor costs for their work on Swann's home and McNair's studio. RAST avoided using Swann's name on invoices, delivery tickets, and internal accounting reports, instead using his nickname, "Little Big Man."

RAST also bought bricks and other materials, and paid different subcontractors for installation of hardwood floors and stairs and exterior brickwork, plumbing work, and painting. RAST paid $3,535 for flooring and stairs installation that Don's Carpet One performed at Swann's new home in 2000 or 2001. In the fall of 1999, RAST paid $1,964 for brick and mortar work by Alabama Brick Delivery. In the fall of 2000, RAST paid Kimro Painting & Services, Inc. ("Kimro Painting") $9,733 for painting work at Swann's new home. In May 2001, RAST paid $4,441.50 to Sherman International for concrete work. The delivery ticket for ready-mix concrete RAST purchased from Sherman International directed delivery to the Swann address but identified it as the "Rast Residence." In October 2001, RAST paid Brown Mechanical Contractors, Inc. ("Brown Mechanical") for $9,540 worth of plumbing work performed at Swann's new home. Bobby Rast had the payments to Brown Mechanical coded as expenses to RAST's Jefferson

County contracts for "Annual Rehab" and "Minor Pump Station."

In the summer of 2000, PUGH began contributing to Swann's new home remodeling. PUGH's President Yessick hired subcontractor Aquatic Gardens to install a waterfall and koi pond at a cost of $7,422. Yessick told Aquatic Gardens to send its invoices to PUGH and not mention Swann by name.

Yessick hired other subcontractors for various work after Swann claimed to have overpaid for the remodeling. Yessick hired Guthrie to help landscape Swann's new home, and in July 2000 Guthrie gave an initial estimate of $40,000. PUGH's book entries and invoices for Guthrie's work on Swann's home were never kept in Swann's name, but always under some other code. Yessick had PUGH's accountant charge Guthrie's expenses to "Metro Park Roadway," a Jefferson County job. By December 2001, PUGH had paid Guthrie $93,680 for its landscaping work at the Swann home, which included $1,200 a month for ongoing weekly yard maintenance.

In January 2002, PUGH's President Yessick asked Guthrie to stop submitting invoices to PUGH, and instead PUGH advanced Guthrie $47,000 for three years worth of landscaping and maintenance on Swann's new home; and Guthrie performed about $10,000 worth of work. Although PUGH's manager of accounts testified she filed Guthrie's invoices regularly and that PUGH kept these records for 5 to 7 years, the invoices were not found during the government's

investigation.[23] In December 2001, Yessick used a PUGH check to buy $1,000 worth of bookstore gift certificates for Swann.[24]

In August 2002, after Grady Pugh and Yessick heard rumors of a government investigation, Guthrie was asked to stop working on Swann's property, even though there was a balance remaining on the advance Yessick had given to Guthrie. At that time, Yessick directed his assistant to send an invoice to Swann's mother-in-law for $12,572 for tree removal and "remodeling work." In September 2002, Yessick instructed his assistant to create an invoice, this time to Swann's mother, for $46,684 of landscaping work. In November 2002, the Swanns paid PUGH this amount with checks drawn from joint checking accounts the Swanns had taken out with their mothers, after

---

[23] Count 101 ($47,000 check from Guthrie) was dismissed on the government's motion during the third day of trial. On that trial day, Paul Guthrie (the owner of Guthrie) testified that, even though Guthrie received a $47,000 check from PUGH's Yessick for Guthrie's work at Swann's home, Guthrie to date had done about $10,000 worth of work on Swann's home, not $47,000. Swann was convicted on Count 52, which charges him with receiving approximately $100,000 in work done by Guthrie.

[24] The government also presented evidence that Bobby and Danny Rast used at least $4,000 of RAST's funds to pay for Swann's expenses on two trips to England. Swann and the Rast defendants were acquitted on Counts 59 (Swann accepted $3,015 trips to England and Scotland) and 68 (Rast defendants paid Swann for those trips).

taking out two home equity loans in each of their mothers' names.[25]

C. The Defense

In the *Swann* trial, the defense basically was that the defendants lacked the corrupt intent to commit bribery and acted at all times in good faith. The contractor-defendants contended they performed work on Swann's home out of goodwill and without expecting anything in return. Swann argued he did not have an intent to be influenced by the things the contractor-defendants gave him.

In addition, the defendants presented evidence showing that Nila Swann (Swann's wife) had an engineering background, acted as her own general contractor, hired and supervised subcontractors, and initially paid the bills for the work on the Swann home. Swann testified that Nila handled all of the couple's financial matters and that he assumed she was paying for the work. According to Swann, Nila frequently changed her mind, was not a good manager, and disputed the cost and scope of the work with the subcontractors. Dougherty and the Rast brothers were longtime friends of Nila and Jack Swann. Swann stated that Dougherty and the Rast brothers stepped in only to offer advice and take over supervision to make the work go more smoothly. The

---

[25] The plan all along had been for the Swanns' mothers to move into the old home after the new home was built.

contractor-defendants claimed that they paid several of these disputed bills to preserve their own business relationships with the subcontractors and their expectation was that the Swanns would eventually reimburse them. However, with the sole exception of PUGH's belated invoices to Swann for landscaping and remodeling work, there was no evidence that the Swanns paid the contractor-defendants for the work at their new home.

As to the conspiracy charge, the defendants also claimed that the government had not presented sufficient evidence to show an unlawful agreement between Swann and any of the contractor-defendants.

In the *Swann* trial, the government presented 404(b) evidence about similar items of value the same contractor-defendants had provided to McNair for his studio, their help with McNair's home in Arkansas, and other benefits they provided for McNair, Barber, and Chandler.

D. Jury's Verdicts

The jury convicted defendants Swann, PUGH, Yessick, RAST, Bobby Rast, FWDE, and Dougherty of conspiring to bribe Swann (Count 51).

The jury convicted Swann on these substantive bribery counts: 52 ($100,000 from PUGH through subcontractor Guthrie Landscaping), 53 ($7,422 from PUGH through subcontractor Aquatic Gardens), and 54 ($1,000 in gift certificates to Alabama Book Smith

from PUGH). The jury convicted defendants PUGH and Yessick on Counts 61-63 (same facts as 52-54, respectively).

The jury convicted defendants Swann, PUGH, and Yessick on Counts 90-100 (honest services mail fraud involving PUGH's paying $93,680 in checks to Guthrie for landscaping work performed for Swann).

The jury also convicted defendant Swann on Counts 57 ($9,733 in painting by Kimro Painting from RAST) and 58 ($8,940 in plumbing by Brown Mechanical from RAST) and defendants RAST and Bobby Rast on Counts 66 and 67 (same facts as Counts 57 and 58, respectively).[26]

The jury also convicted defendant Swann on Count 60 ($24,176 for construction supervision by

---

[26] In the *Swann* trial, the jury acquitted defendant *Danny* Rast on Count 51 (conspiracy to bribe Swann), on Count 66 ($9,733 in painting work for Swann by Kimro Painting) and on Count 67 ($8,940 in plumbing work for Swann by Brown Mechanical).

The jury also acquitted defendant Swann on Count 59 ($3,015 bribe received by Swann from the Rast defendants in the form of England and Scotland trips); defendants RAST, Bobby Rast, and Danny Rast on Count 68 ($3,015 bribe given to Swann in the form of England and Scotland trips); and defendant PUGH on Count 125 (obstruction of justice).

FWDE's Stanger) and defendants FWDE and Dougherty on Count 69 (same facts as Count 60).[27]

In summary, the jury convicted defendant Swann on the bribery conspiracy count, six substantive bribery counts, and eleven honest services mail fraud

---

[27] When the Indictment was severed into the five separate cases for trial, Counts 107-121 of the Indictment were scheduled to be tried in the *Wilson* trial (05-545). The government later dismissed Counts 107-121 and re-filed them essentially as Counts 1-17 in a new indictment docketed as case number 06-084. This case (06-084) was consolidated for trial with the *Swann* trial (05-544).

> The *Swann* jury heard evidence on these 17 counts of honest services mail fraud under 18 U.S.C. §§ 1341 and 1346. In November 1999, Wilson resigned from the JCESD and formed his own engineering consulting firm, CEDS. With Swann's help, Wilson immediately obtained two no-bid engineering contracts ($483,000 and $350,000) from the County worth a total of $833,000. To get around "revolving door" provisions in Alabama's ethics law that prohibited former employees from doing business with the County for two years, Wilson made arrangements for his firm to operate as FWDE's "subcontractor." FWDE was awarded the contracts. Even though Wilson's firm performed the work, FWDE passed Wilson's invoices on to the County under FWDE's own name. These 17 counts of honest services mail fraud related to money paid to CEDS.
>
> Wilson and CEDS pled guilty to one count each and are not defendant-appellants in the *Swann* appeal. The *Swann* jury acquitted Swann, FWDE, and Dougherty on these 17 counts involving money paid to CEDS through FWDE. This evidence was introduced only in the *Swann* trial, not in the *Wilson* trial.

counts. The jury convicted defendants PUGH and Yessick on the bribery conspiracy count, three substantive bribery counts, and eleven honest services mail fraud counts. The jury convicted defendants RAST and Bobby Rast on the bribery conspiracy count and two substantive bribery counts. The jury convicted FWDE and Dougherty on the bribery conspiracy count and one substantive bribery count. Defendants Swann, PUGH, RAST, Bobby Rast, FWDE, and Dougherty appeal all conviction counts.

IV. THE *WILSON* TRIAL (05-545)

In the *Wilson* trial, held from June 1 to 13, 2006, defendants Wilson and PUGH were charged with conspiring to commit bribery (Count 75). Defendant Wilson was charged with accepting from PUGH a $4,500 bribe in the form of a scholarship for his son to attend the University of Alabama at Birmingham ("UAB") (Count 76). The defense argued that the scholarship was not intended as a bribe.

The government called 9 witnesses, including Chandler, Grady Pugh, and Roland Pugh's secretary Janice Kuykendall. The defense called 3 witnesses.

A. Wilson Helps PUGH

Defendant Wilson was the Chief Civil Engineer for the JCESD and served on the PRC. As Chief Civil Engineer, Wilson was in charge of all sewer line work. Wilson was also the project engineer on several

construction contracts, including some of PUGH's. As project engineer, defendant Wilson approved all sewer contractor pay requests, which were submitted monthly, before sending them on to Chandler, the JCESD's Assistant Director. Project engineers also approved requests for extensions of time to complete contracts. Contractors were subject to a penalty of $1,000 per day if they failed to complete a contract on time.

On July 26, 1999, PUGH submitted to USI – the outside consulting engineer for the "Village East 3" contract – a request for a 175-day extension to complete work on the project. The completion date was May 11, 1999. On July 27, 1999, USI forwarded the request to defendant Wilson. When PUGH requested the 175-day extension on July 26, it was already 76 days overdue. PUGH was at risk for a $76,000 penalty – $1,000 in liquidated damages for each of the 76 days.

On August 20, 1999, defendant Wilson faxed Grady Pugh a letter instructing him to send $4,500 to UAB for Wilson's son. On August 23, defendant Wilson approved the extension. This saved PUGH not only the $76,000 penalty for the delay from May 11 to July 26 but also $1,000 per day for each day until PUGH completed the job. On August 24, 1999, PUGH sent a $4,500 check to UAB for Wilson's son.

In addition, defendant Wilson served on the PRC, which set technical standards for construction firms who bid on contracts for the County's sewer project.

Some of the projects called for "cured-in-place" ("CIP") or "trenchless" techniques for replacing existing sewer lines. In the late 1990s, this was a relatively new technology, and only a handful of contractors had the expertise to do it properly. Like other municipalities, Jefferson County required contractors to meet specified minimum requirements for prior experience before they were permitted to bid on CIP work.

In September 1999, the PRC significantly tightened these requirements, making it more difficult for new contractors to pre-qualify. However, the three contractors who were already doing CIP work in Jefferson County were grandfathered in and did not have to go through the pre-qualification process. Two of those three CIP contractors were joint venture partners with RAST and PUGH. Although the three contractors did compete against each other in a sealed bidding process, Jefferson County's qualification requirements cut down the number of competitors and enabled these CIP contractors to charge Jefferson County higher prices than they could charge other municipalities for similar work. When two non-local competitors finally qualified to join the bidding in 2001, prices quickly dropped from over $50 per linear foot to about $28.

The government also offered 404(b) evidence showing certain items of value that PUGH provided for McNair, Chandler, and Barber, and that RAST

provided for Wilson,[28] and the favorable decisions PUGH obtained from the JCESD. Grady Pugh offered similar testimony, and, as in the *McNair* trial, the defense again attempted to impeach Grady Pugh by pointing out inconsistencies in his testimony, his hatred of his father (Roland Pugh), and his efforts to obtain a favorable sentencing recommendation from the government.

B. Bribes of Wilson

Sometime in mid-1999, defendant Wilson complained to Grady Pugh over lunch about the cost of college and that he might not be able to afford to send his son Justin to UAB for the upcoming semester (fall 1999). Grady Pugh responded that PUGH "had done a lot" for "colleges and education" and suggested PUGH might "sponsor a scholarship," but wanted to make sure "we couldn't get in any trouble for it." Sometime in August 1999, Wilson called Grady Pugh to accept the scholarship offer.

As noted above, on August 20, 1999, defendant Wilson used a JCESD fax machine to send Grady Pugh a letter expressing his gratitude and instructing him to send a $4,500 check to UAB to credit Wilson's son's account. PUGH sent the check to UAB four days later. There was no evidence that the son ever sent PUGH an application for the scholarship. Grady

---

[28] RAST paid for Wilson to spend a week in London and a weekend in Paris with his wife.

Pugh's secretary typed the letter and signed Grady Pugh's name. Grady Pugh never met nor spoke with Wilson's son before sending the $4,500 check to UAB on August 24, 1999. The accompanying letter simply asked UAB to credit the payment to Wilson's son's account and gave no other instructions. Although PUGH had made charitable contributions to schools and colleges, including UAB, it had never previously awarded a scholarship to an individual student. Grady Pugh thought the money would go toward "books and tuition" but could not remember exactly what Wilson had said to him.

Grady Pugh was unaware that FWDE had already paid Wilson's son's tuition and fees for the 1999-2000 school year.[29] UAB applied PUGH's scholarship money to Wilson's son's account in four quarterly installments of $1,125 per installment, as was its standard practice for scholarships when a donor did not instruct otherwise. UAB took about one third of the PUGH money to cover the son's housing and other fees, and disbursed the remainder of the PUGH money directly to the son each quarter. The installments were disbursed to the son in September 1999, December 1999, March 2000, and June 2000. Wilson's son signed a receipt each time. Grady Pugh testified that he never did anything after August 1999 to follow up on the "scholarship" and he did not know

---

[29] The government did not allege there was anything improper about the FWDE scholarship.

that UAB would defer full payment into the following year. The government did not present any evidence that Wilson was aware of UAB's payment arrangements.

Grady Pugh explained his intent in giving the scholarship to Wilson's son:

> When you offer somebody something like that . . . you expect them to help you if they can. And when I did that for [Wilson], I felt like if he got a chance to help us, he would.

Grady Pugh explained that giving things of value to County employees provided PUGH with the "general benefit" of "hav[ing] preferential treatment and, you know, if we had problems it would help resolve the problems. Numerous ways that things could be made easier."

C. Jury's Verdicts

The jury convicted defendants Wilson and PUGH on Count 75 and defendant Wilson on Count 76. Wilson has not appealed. PUGH appeals as to Count 75.[30]

---

[30] Count 77 charged PUGH with the substantive offense of bribing Wilson with the scholarship, but was dismissed before trial on the government's motion.

V. THE *BARBER* TRIAL (05-542)

In the *Barber* trial, held from January 8 to 17, 2007, defendants Barber, PUGH, Roland Pugh, and Yessick were charged with conspiring to bribe Barber by, among other things, PUGH's paying and Barber's accepting $47,927 in real property and nearly $1,200 in trips to casinos and beaches (Count 78). Defendants PUGH and Roland Pugh were also charged with bribing Barber by giving him that $47,927 property (Count 83), and defendant PUGH was charged with paying for these trips (Counts 84-86).[31]

Defendants Barber and Yessick pled guilty to Count 78. Only PUGH and Roland Pugh went to trial. The government called 7 witnesses, including Chandler, Grady Pugh, and Yessick. The defense called 7 witnesses, including Barber.

A. Barber Helps PUGH

Barber supervised the JCESD's twenty-six jobsite County inspectors. Barber was responsible for hiring sewer contractors to do no-bid emergency work, approving contractors' paperwork, and certifying their expenses before sending the expenses to JCESD Assistant Director Chandler.

---

[31] The trips were to Isle of Capri Casino, Vicksburg, Mississippi ($148), Beau Rivage Resort & Casino, Biloxi, Mississippi ($546), and Phoenix III Condominiums, Gulf Shores, Alabama ($481).

In January 2000, Barber determined the sewer pipes in the Paradise Lake subdivision should be replaced on an emergency basis instead of being repaired. On January 7, Barber told City Inspector Hodges that Barber had chosen a contractor who could do the job in about 45 days. PUGH's President Yessick sent Barber a letter, dated January 27, 2000, offering that PUGH could do the job for about $1.2 million. That same day, Yessick also sent Hodges a letter, dated January 27, 2000, stating that PUGH would be performing the job. Given that emergency work contracts were limited to $50,000 or less, PUGH eventually received a no-bid field directive in the amount of $857,000, on which PUGH made a 50% profit. However, because Barber had classified the work as an emergency, there was no contract for Paradise Lake on which to put the field directive. The emergency work contract therefore was placed on the unrelated multi-million-dollar Cahaba River project.

B. Bribes of Barber

Beginning in 1997 and continuing through 2001, PUGH's President Yessick caused PUGH to pay to send Barber on an annual beach resort or casino vacation in locations including Orange Beach, Alabama and Biloxi and Vicksburg, Mississippi. PUGH paid $148 for Barber's stay in Vicksburg, $546 for his stay in Biloxi, and $481 for his stay at the Phoenix III Condominiums in Orange Beach, Alabama. PUGH recorded the payments for the trips to Orange Beach and Biloxi in PUGH's books as sewer "rehab" projects.

In the spring of 2000, Barber asked PUGH's Yessick if he would find and purchase a piece of property in McCalla, Alabama on which Barber could retire. Yessick consulted a realtor for this purpose, visited several properties himself, and, in November 2000, signed a contract to purchase land in the name of "Roland Pugh" for $47,500. The next week, Yessick gave the realtor a check for $1,000, signed by PUGH's CFO Lorelei Heglas. In anticipation of the cost PUGH would incur for the land purchase, Yessick instructed PUGH CFO Heglas to charge $45,000 to the Paradise Lake project.

However, days before closing, Roland Pugh's administrative assistant Janice Kuykendall told Yessick that PUGH no longer intended to buy the land in PUGH's name but instead planned to give Barber a cashier's check to buy the land in his own name. PUGH assistant Kuykendall told Yessick to travel to Tuscaloosa to get the check and then take back from the realtor all documents referring to PUGH.

PUGH's Yessick got the check, which was made out to the settlement attorney for $46,877, and on which the "NAME OF REMITTER" line was left blank. Yessick then gave Barber the check. Barber closed on the land contract in his own name on December 18, 2000. Yessick also gave Barber a cashier's check for $1,050 to replace the check he gave to the realtor. The realtor prepared papers to refund PUGH's deposit.

In September 2002, a newspaper article revealed an investigation into PUGH and Barber. Six months later, over a seven-week period, Barber sent PUGH a series of checks amounting to $46,877. Yet Barber paid no interest, and there was no evidence of any document indicating a loan.

At trial Yessick testified that he paid the charged bribes in the hope that Barber, who supervised the JCESD's job-site inspectors, would assist if PUGH were to have a problem with an inspector being "irrational." Counsel for PUGH and Roland Pugh argued that they did not provide things to Barber with the intent to influence him.[32] The government presented 404(b) evidence showing that PUGH's Yessick paid for Chandler to go on a fishing vacation, that Grady Pugh bought a carpet for McNair, that Grady Pugh made cash payments to McNair, and that PUGH worked on McNair's home in Arkansas.

C. Jury's Verdicts

The jury convicted PUGH on Counts 78 (bribery conspiracy), 83 ($47,927 in real property), and 84-86 (trips). Roland Pugh was acquitted on Counts 78 and 83, the only counts against him in the *Barber* trial. PUGH appeals all conviction counts.

---

[32] Defendant Roland Pugh called Barber to testify that he (Barber) never met Roland Pugh until after the relevant time period and that Barber did not have an intent to be influenced by the trips that PUGH bought for him.

VI. QUID PRO QUO ISSUES

All defendant-appellants argue that their bribery convictions under 18 U.S.C. § 666[33] must be vacated because the Indictment failed to allege, and the government failed to prove, the contractor-defendants gave specific benefits to County employees in exchange for, and with the intent that, the employees perform a specific official act, termed a *quid pro quo.*[34] The defendant-appellants also argue the district court erred, at a minimum, by refusing to charge the jury that the government must prove a specific *quid pro quo.* We begin by reviewing the relevant parts of § 666.[35]

---

[33] The defendant-appellants' § 666 convictions are: (1) McNair, Counts 1-3, 5-12, 32; (2) Swann, Counts 51-54, 57, 58, 60; (3) PUGH, Counts 1, 15, 51, 61-63, 71, 75, 78, 83-86; (4) Roland Pugh, Count 1; (5) RAST, Counts 1, 19-24, 51, 66, 67, 72, 87; (6) Bobby Rast, Counts 1, 19-22, 51, 66, 67, 72, 87; (7) Danny Rast, Counts 1, 19, 20, 22; (8) FWDE, Counts 1, 28, 51, 69; and (9) Dougherty, Counts 1, 28, 51, 69.

[34] Black's Law Dictionary defines *quid pro quo* as follows: "An action or thing that is exchanged for another action or thing of more or less equal value; a substitute." *Black's Law Dictionary* 1367 (9th ed.2009). Defendants argue the government must prove a specific or identifiable thing of value was exchanged for a specific or identifiable official act.

[35] The interpretation of a statute is a question of law we review *de novo. United States v. Searcy,* 418 F.3d 1193, 1195 (11th Cir.2005); *United States v. Mazarky,* 499 F.3d 1246, 1248 (11th Cir.2007). Whether an indictment is sufficient is also a question of law reviewed *de novo. United States v. Steele,* 178 F.3d 1230, 1233 (11th Cir.1999). "An indictment is sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused

(Continued on following page)

A. 18 U.S.C. § 666

Section 666 proscribes theft and bribery in connection with programs of local governments receiving federal funds.[36] Section 666(a)(1)(B) criminalizes a local government employee's "corruptly" soliciting or accepting a bribe:

> (a) Whoever . . .
>
> (1) being an agent[37] of [a] local . . . government, or any agency thereof –
>
> . . . .

---

of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *Id.* at 1233-34 (quotation marks omitted).

[36] A predicate to a § 666 offense is that the defendant must be an agent of an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). It is undisputed that Jefferson County received the requisite amount of federal funds and that McNair, Swann, Wilson, Barber, Chandler, Ellis, and Creel were employees and thus agents of Jefferson County.

[37] As to "agent," the district court in the *McNair* trial charged the jury: "The term 'agent' means a person authorized to act on behalf of a local government and includes an employee, officer, manager or representative of a local government. Jefferson County, Alabama is a local government of Alabama." In the *Swann*, *Barber*, and *Wilson* trials, the district court charged the jury: "The term 'agent' as relevant to this case means any employee, officer, director, manager or representative of a local government. Jefferson County, Alabama, is a local government of Alabama."

> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such . . . government, or agency involving anything of value of $5,000 or more; or
>
> shall be fined . . . , imprisoned not more than 10 years, or both.

18 U.S.C. § 666(a)(1)(B). Defendants McNair, Swann, Wilson, and Barber, as Jefferson County employees, violated § 666(a)(1)(B) if: (1) they solicited or accepted anything of value; (2) with the corrupt intent to be influenced or rewarded; (3) in connection with any business, transaction, or series of transactions of Jefferson County involving anything of value of $5,000 or more.[38] *Id.* The counts in the Indictment as

---

[38] The $5,000 in § 666(a)(1)(B) and (a)(2) refers to the value of the "business, transaction, or series of transactions," not the value of the bribe. *See United States v. Zimmermann,* 509 F.3d 920, 927 (8th Cir.2007) (concluding a benefit of more than $5,000 received for less than $5,000 in bribes was sufficient for a § 666(a)(1)(B) conviction); *see also Salinas v. United States,* 522 U.S. 52, 57, 118 S.Ct. 469, 473, 139 L.Ed.2d 352 (1997) ("Subject to the $5,000 threshold for the business or transaction in question, the statute forbids acceptance of a bribe by a covered official. . . ."); *United States v. Castro,* 89 F.3d 1443, 1454 (11th Cir.1996) (describing in dicta the $5,000 element in § 666(a)(2) as "in connection with any business transaction [sic] or series of transactions"); *but see United States v. Abbey,* 560 F.3d 513, 521 (6th Cir.) (stating in dicta that "§ 666 contains . . . a requirement

(Continued on following page)

to McNair and Swann track the language of the statute.

Section 666(a)(2) also criminalizes "corruptly" offering or giving a bribe to a local government employee:

> (a) Whoever . . .
>
> . . . .
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of [a] . . . local . . . government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined . . . , imprisoned not more than 10 years, or both.

---

that the illegal gift or bribe be worth over $5,000"), *cert. denied*, ___ U.S. ___, 130 S.Ct. 739, ___ L.Ed.2d ___ (2009). Where the bribe-giver receives an intangible benefit, some courts have used the bribe amount as a proxy to stand for the value of the business or transaction. *See United States v. Marmolejo*, 89 F.3d 1185, 1194 (5th Cir.1996) (using, under § 666(a)(1)(B), the more than $5,000 paid to sheriff to determine the value of conjugal visits received by prisoner); *United States v. Fernandes*, 272 F.3d 938, 944 (7th Cir.2001) (using the value of bribes to prosecutor, under § 666(a)(1)(B), where prosecutor received bribes in exchange for his expunging the bribe-givers' DUI convictions). Here, the parties do not dispute that the $5,000 level was met.

Id. § 666(a)(2). The contractor-defendants – PUGH, Roland Pugh, RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty – violated § 666(a)(2) if: (1) they gave to a County employee anything of value; (2) with the corrupt intent to influence or reward them; (3) in connection with any business, transaction, or series of transactions of Jefferson County involving anything of value of $5,000 or more. *Id.* The counts in the Indictment as to these contractor-defendants also track the language of § 666(a)(2).

It is well established in this Circuit that an indictment is sufficient if it tracks the language of the statute and provides a statement of facts that gives notice of the offense to the accused. *See United States v. Jordan,* 582 F.3d 1239, 1246 (11th Cir.2009); *United States v. Walker,* 490 F.3d 1282, 1296 (11th Cir.2007); *United States v. Sharpe,* 438 F.3d 1257, 1263 (11th Cir.2006); *United States v. Ndiaye,* 434 F.3d 1270, 1299 (11th Cir.2006). By listing the items of value received or given by the defendants, each count of the Indictment provides sufficient facts and circumstances to give adequate notice of the charges to be defended against. Thus, we readily determine the Indictment itself was not defective for failure to allege a specific *quid pro quo.*

B. Paradies and US Infrastructure Decisions

Nonetheless, this does not resolve whether the language in § 666(a)(1)(B) or (a)(2) effectively requires the government to prove a specific *quid pro*

quo to obtain a § 666 conviction. This question has been before this Court twice before but only under plain error review, and even then, we did not squarely answer it. *See United States v. US Infrastructure,* 576 F.3d at 1212-14; *United States v. Paradies,* 98 F.3d 1266, 1289 (11th Cir.1996).

In *Paradies,* the defendant claimed that the district court erred in failing to charge the jury that a *quid pro quo* was an element required to convict under § 666. *Id.* at 1289. This Court did not decide if *quid pro quo* was an element but concluded there was no reversible jury charge error because the jury charge tracked the statutory language of § 666 and the defendant did not object to the charge. *Id.*

The *Paradies* Court also rejected a challenge to the sufficiency of the evidence. *Id.* The *Paradies* Court stated: "the evidence at trial was sufficient for a jury to find that Jackson [the official] accepted payments for his votes and his influence upon the City Council and the administration," and "[s]uch a finding would satisfy any quid pro quo requirement under the statute." *Id.* In other words, *Paradies* concluded that even if § 666 requires a *quid pro quo,* that requirement is satisfied by showing a series of payments intended generally to influence the official's decisions.

Subsequently, our *United States v. US Infrastructure* decision involved an appeal from the fifth trial (the *USI* trial, 05-543) that arose out of the Indictment here. *US Infrastructure,* 576 F.3d at 1202-03.

The defendants in *US Infrastructure* argued the jury charges on the § 666 counts were erroneous because they did not include their proposed instruction that the jury must find a specific *quid pro quo* to convict under § 666. *Id.* at 1213. This Court concluded that the district court "did not commit plain error by refusing [defendants'] *quid pro quo* [jury] instruction." *Id.* at 1214. As its sole basis for this conclusion, *US Infrastructure* stated this Court had already rejected this argument in two prior cases: "This Court has rejected the argument that the government must 'show a direct *quid pro quo* relationship between [the defendants] and an agent of the agency receiving federal funds.'" *US Infrastructure,* 576 F.3d at 1214 (quoting *United States v. Castro,* 89 F.3d 1443, 1454 (11th Cir.1996), and citing *Paradies,* 98 F.3d at 1289). However, as shown above, *Paradies* did not actually make a holding to that effect. Neither did *United States v. Castro.*[39] Nonetheless, *US Infrastructure*

---

[39] In *Castro,* the issue was whether § 666(a)(2) required that the bribe-givers intended to enter into a direct exchange with an agent of an entity receiving the federal funds, or if it was sufficient that they offered the bribe to a third-person middleman with the intent to influence that agent by having that middleman authorize that agent to issue payments to the defendants. *Castro,* 89 F.3d at 1453-54. The *Castro* Court concluded that "influence" under § 666 could be exercised indirectly and that it was sufficient that the defendants intended to influence the agent by causing a middleman to authorize the agent to issue payments. *Id.* Although in reaching this conclusion the *Castro* Court stated, "[w]e reject appellants' suggestion that the government had to show a direct *quid pro quo* relationship between [the defendants] and an agent of the

(Continued on following page)

itself holds a specific *quid pro quo* is not required for a § 666 conviction. Because *US Infrastructure* was only plain error review, we now make the same holding but under *de novo* review.

We begin with the statutory language itself.[40] Importantly, § 666(a)(1)(B) and (a)(2) do not contain the Latin phrase *quid pro quo*. Nor do those sections contain language such as "in exchange for an official act" or "in return for an official act." In short, nothing in the plain language of § 666(a)(1)(B) nor § 666(a)(2) requires that a specific payment be solicited, received, or given in exchange for a specific official act. To accept the defendants' argument would permit a person to pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating § 666.

The requirement of a "corrupt" intent in § 666 does narrow the conduct that violates § 666 but does not impose a specific *quid pro quo* requirement. In all

---

agency receiving federal funds," *id.*, *Castro* was addressing whether there was a "directness" requirement between the bribe-giver and the agent and did not answer the question before us here.

[40] "When construing a criminal statute, [this Court] begin[s] with the plain language; where 'the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.'" *United States v. Browne*, 505 F.3d 1229, 1250 (11th Cir.2007) (quoting *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*)).

the trials consolidated in this appeal, the district court's jury charge, with slight variations, defined "corruptly" as follows: "An act is done 'corruptly' if it is performed voluntarily, deliberately and dishonestly for the purpose of *either* accomplishing an unlawful end or result *or* of accomplishing some otherwise lawful end or lawful result by an[y] unlawful method or means." It is acting "corruptly" – dishonestly seeking an illegal goal or a legal goal illegally – that separates permissible from criminal. The addition of a corrupt *mens rea* avoids prosecution for acceptable business practices.[41]

For all of these reasons, we now expressly hold there is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.

As to the defendant County employees, the government must show only what § 666(a)(1)(B) says: that a County employee "corruptly" accepted "anything of value" with the intent "to be influenced or

---

[41] We do not read the definitional language of "corrupt" to impose a *quid pro quo* requirement. In any event, the district court charged that definition. It also has been suggested that § 666's language – a thing of value given with corrupt intent to influence – effectively constitutes a *quid pro quo* in that the payment is made for influence. This at best would be "*quid pro quo* light." Even if one views § 666 this way, the district court charged the language of the § 666 statute.

rewarded in connection with any business, transaction, or series of transactions" of the County. And as to the contractor-defendants, the government must show only what § 666(a)(2) says: that the defendant "corruptly" gave "anything of value" to a County employee with the intent "to influence or reward" that person "in connection with any business, transaction, or series of transactions" of the County.

To be sure, many § 666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict. Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee. The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific *quid pro quo*.[42]

---

[42] The defendant-appellants rely on *United States v. Siegelman*, 561 F.3d 1215 (11th Cir.2009), *petition for cert. filed*, 78 U.S.L.W. 3083 (U.S. Aug. 10, 2009) (No. 09-167), 78 U.S.L.W. 3090 (U.S. Aug. 10, 2009) (No. 09-182), and *United States v. Massey*, 89 F.3d 1433 (11th Cir.1996), but neither case answers the question here. In *Siegelman*, the district court gave a *quid pro quo* instruction in response to the defendant's request. The district court instructed the jury that they could not convict unless "the defendant and official *agree* that the official will take specific action in exchange for the thing of value." *Siegelman*, 561 F.3d at 1225. This Court stated "[s]o, whether or not a *quid pro quo* instruction was legally required, such an instruction was given," and "[t]herefore *assuming* a *quid pro quo* instruction was required in this case, we find no reversible error." *Id.* at 1225, 1227.

In *Massey*, "[t]he jury convicted [attorney] Massey of one count of bribery in violation of 18 U.S.C. § 666(a)(2) finding that Massey purchased [Judge] Sepe's lunches at Buccione in exchange for court appointments." *Massey*, 89 F.3d at 1439. This Court rejected Massey's claim that the government was required to produce direct evidence of a verbal or written agreement to this effect and stated "inferences drawn from relevant and competent circumstantial evidence" were sufficient. *Id.* (quotation marks omitted). The *quid pro quo* issue here was not raised or discussed in *Massey*. The fact that the evidence of a specific exchange was sufficient to sustain the § 666(a)(2) bribery conviction in *Massey* does not mean one is required to obtain a § 666(a)(2) conviction here.

C. Other Circuits

In concluding § 666 does not require a specific *quid pro quo*, we align ourselves with the Sixth and Seventh Circuits. *See United States v. Abbey*, 560 F.3d 513, 520 (6th Cir.), *cert. denied*, ___ U.S. ___, 130 S.Ct. 739, ___ L.Ed.2d ___ (2009) (stating "the text says nothing of a quid pro quo requirement to sustain a conviction" and "while a *quid pro quo* of money for a specific legislative act is sufficient to violate [§ 666(a)(1)(B) or (a)(2)], it is not necessary") (quotation marks omitted); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir.2005) (holding that "[a] *quid pro quo* of money for a specific legislative act" is not necessary under § 666(a)(1)(B) and that an exchange

of money for the official's "influence" was enough); *United States v. Agostino,* 132 F.3d 1183, 1190 (7th Cir.1997) ("We decline to import an additional, specific *quid pro quo* requirement into the elements of § 666(a)(2)."); *but see United States v. Jennings,* 160 F.3d 1006, 1014 (4th Cir.1998) (concluding the "corrupt intent" element in § 666 requires the government to prove a *quid pro quo,* but stating the "*quid pro quo* requirement is satisfied so long as the evidence shows a 'course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor'" and "the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that'" (citations omitted)).

The Second Circuit's decision in *United States v. Ganim,* 510 F.3d 134 (2d Cir.2007), also supports our analysis to some extent.[43] The defendant "Ganim's

---

[43] The defendant in *Ganim* was convicted of these "bribery-related crimes": "(1) extortion in violation of the Hobbs Act, 18 U.S.C. § 1951; (2) 'honest services mail fraud' in violation of 18 U.S.C. §§ 1341 & 1346; (3) federal programs bribery in violation of 18 U.S.C. § 666(a)(1)(b) [sic]; and (4) bribe receiving in violation of Connecticut General Statutes section 53a-148 (collectively, the 'bribery-related crimes')." *Ganim,* 510 F.3d at 141. The *Ganim* opinion first analyzed the *quid pro quo* issue collectively as to the bribery-related crimes. *Id.* at 141-42. It later discussed the jury charges under an "Extortion" subheading, but much of that discussion related to all bribery-related crimes in the case. *Id.* at 142-47. Because *Ganim* discussed the bribery-related crimes collectively, it did not focus on the language of § 666(a)(1)(B).

challenges to the jury charge primarily relate[d] to a single issue: namely, whether proof of a government official's promise to perform a future, but unspecified, official act is sufficient to demonstrate the requisite quid pro quo for a conviction" under § 666(a)(1)(B). *Id.* at 141-42. Although accepting a *quid pro quo* requirement for a bribery conviction, the Second Circuit rejected Ganim's claim that "a direct link must exist between a benefit received and a specifically identified official act." *Id.* at 142. The Second Circuit held "that the requisite quid pro quo for the crimes at issue [which included § 666(a)(1)(B)] may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts *or to perform such acts as the opportunities arise.*" *Id.* (emphasis added). The Second Circuit added that "so long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts for the giver, it need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single official act." *Id.* at 147.

The Second Circuit also explained that "requiring a jury to find a quid pro quo . . . ensures that a particular payment is made in exchange for a *commitment* to perform official acts to benefit the payor in the future," and "[o]nce the quid pro quo has been established, however, the specific transactions comprising the illegal scheme need not match up this for that." *Id.* at 147. The Second Circuit's analysis lies somewhere beyond a no-*quid pro quo* requirement, as

adopted by the Sixth, Seventh, and now the Eleventh Circuits, and the Fourth Circuit's requirement. While the Second Circuit requires a *quid pro quo,* that requirement is satisfied by a *quid* (thing of value) in exchange for a promise to perform an unidentified, official act at some point in the future. *Id.* at 142-47. In other words, in the Second Circuit the *quo* need not be specific or even identifiable at the time of the *quid,* and to that extent the Second Circuit arguably supports our conclusion. And to some extent, confusion reigns in this area because courts often use the term *quid pro quo* to describe an exchange other than a particular item of value for a particular action.

D. Sun-Diamond and § 201

Because there is no support for the defendant-appellants' *quid pro quo* argument in the text of § 666, they rely on how the Supreme Court interpreted a different criminal statute, 18 U.S.C. § 201, in *United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999). However, *Sun-Diamond* does not address § 666, and there are significant differences in the text of the two statutes (§§ 201 and 666).

The defendant Sun-Diamond was a trade association convicted of providing "illegal gratuities" under 18 U.S.C. § 201(c)(1)(A) for having given tickets, meals, and other items to the federal Secretary of Agriculture. *Id.* at 401, 119 S.Ct. at 1404-05. Section 201(c)'s illegal gratuity provision prohibited

Sun-Diamond from: "giv[ing] . . . anything of value to any public official . . . *for or because of any official act* performed or to be performed by such public official. . . ." 18 U.S.C. § 201(c)(1)(A) (emphasis added).[44] In *Sun-Diamond,* the district court charged the jury it could convict if it found "Sun-Diamond provided [the Secretary] with unauthorized compensation *simply because he held public office,*" and that "[t]he government need not prove that the alleged gratuity was linked to a specific or identifiable act or any act at all." *Id.* at 403, 119 S.Ct. at 1405 (emphasis added). The "point in controversy" was that the jury instructions suggested that an illegal gratuity "did not require any connection between [defendant's] intent and a specific official act." *Id.* at 405, 119 S.Ct. at 1406.

The Supreme Court in *Sun-Diamond* concluded that § 201(c) *did require* a link between the gratuity and a specific "official act" because the statutory text prohibited gratuities given or received "*for or because of any official act performed or to be performed*" and then defined "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy. . . ." *Id.* at 406, 119 S.Ct. at 1407 (quoting § 201(c)(1)(A) and (a)(3)). And it was specifically this text of the illegal gratuity statute – "for or because of any official act" – that the Supreme Court in

---

[44] There is no threshold monetary requirement in §§ 201(b) or 201(c)(1)(A).

Sun-Diamond found to be "pregnant with the requirement that *some particular official act* be identified and proved." *Id.* at 406, 119 S.Ct. at 1407 (emphasis added). In stark contrast, none of these phrases are used in §§ 666(a)(1)(B) or 666(a)(2).

We recognize that the Supreme Court in *Sun-Diamond* also distinguished between a § 201(b) bribery crime and a § 201(c) illegal gratuity crime. *Id.* at 404-05, 119 S.Ct. at 1406. The Supreme Court pointed out that bribery in § 201(b) "requires a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, *inter alia,* 'to influence any official act' (giver) or in return for 'being influenced in the performance of any official act' (recipient)." *Id.* at 404, 119 S.Ct. at 1406 (quoting 18 U.S.C. § 201(b)). The Supreme Court explained that "[t]he distinguishing feature of each crime is its intent element." *Id.* at 404, 119 S.Ct. at 1406. The Supreme Court explained further that in § 201:

> Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, *for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act.* An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public

> official will take (and may already have determined to take), or for a past act that he has already taken.

Id. at 404-05, 119 S.Ct. at 1406 (emphasis added).[45] The Supreme Court also stated: "The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a *quid pro quo*." *Id.* at 405, 119 S.Ct. at 1406.

Although § 201(b) requires that a bribe be given or received to influence an "official act" or "in return for" an "official act," § 666 sweeps more broadly than either § 201(b) or (c). Section 666 requires only that money be given with intent to influence or reward a government agent "in connection with any business, transaction, or series of transactions." 18 U.S.C. § 666(a)(1)(B) & (a)(2). Section 666 does not say "official act" but says "any business, transaction, or series of transactions." *Id.* Section 666 does not say "in return for" or "because of" but says "in connection with." *Id.*

More importantly, the Supreme Court in *Sun-Diamond* was concerned with accidentally criminalizing *legal* gratuities under § 201(c), such as giving a ball cap, a sports jersey, or token gift to the Secretary

---

[45] A bribe under § 201(b) is punishable by up to 15 years' imprisonment, while the lesser crime of illegal gratuity under § 201(c) is punishable by up to 2 years' imprisonment. 18 U.S.C. § 201(b), (c).

of Agriculture "based on his official position and not linked to an identifiable act." *Id.* at 406-07, 119 S.Ct. at 1407; *see Ganim,* 510 F.3d at 146 ("Undergirding the [Supreme] Court's decision in *Sun-Diamond* was a need to distinguish legal gratuities (given to curry favor of an official's position) from illegal gratuities (given because of a specific act)."). That concern is diminished here because § 666 contains a corrupt intent requirement. In any event, as reasoned by the Second Circuit, "there is good reason to limit *Sun-Diamond*'s holding to the statute at issue in that case, as it was the very text of the illegal gratuity statute – 'for or because of any official act' – that led the Court to its conclusion that a direct nexus was required to sustain a conviction under § 201(c)(1)(A)." *Ganim,* 510 F.3d at 146. "Nor is there any principled reason to extend *Sun-Diamond*'s holding beyond the illegal gratuity context." *Id.*

E. Rule of Lenity

We also reject defendant-appellants' argument that the rule of lenity requires us to read a specific *quid pro quo* requirement into § 666. The rule of lenity may apply in a number of different circumstances. For example, "[t]he rule of lenity is applied when a broad construction of a criminal statute would 'criminalize a broad range of apparently innocent conduct.'" *United States v. Svete,* 556 F.3d 1157, 1169 (11th Cir.2009) (*en banc*) (quoting *Liparota v. United States,* 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434 (1985)), *cert. denied,* ___ U.S. ___, 130

S.Ct. 1881, 176 L.Ed.2d 369 (2010). However, "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Muscarello v. United States,* 524 U.S. 125, 138, 118 S.Ct. 1911, 1919, 141 L.Ed.2d 111 (1998). The mere possibility of a narrower statutory construction by itself does not make the rule of lenity applicable. *Svete,* 556 F.3d at 1169. Application of the rule requires a "grievous ambiguity." *Muscarello,* 524 U.S. at 138-39, 118 S.Ct. at 1919 ("The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.' ") (citation omitted).

The rule of lenity does not apply here because defendant-appellants fail to identify a "grievous ambiguity" in § 666(a)(1)(B) or (a)(2), or to show that the statutory language criminalizes innocent behavior. Section 666(a)(1)(B) and (a)(2) criminalize only those acts done "corruptly," and, indeed, § 666 provides a defense for "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c).

F. Defendants' Proposed Jury Charges

In the *McNair, Swann, Barber,* and *Wilson* trials, all defendant-appellants requested jury charges that included a *quid pro quo* requirement.[46]

---

[46] For example, in the *McNair* trial, PUGH requested this instruction:

> In order for you to find defendant [PUGH] guilty, you must find beyond a reasonable doubt that [PUGH] gave something of value to Defendant McNair with the specific intent of obtaining a *quid pro quo,* that is, that [PUGH] gave the item of value with the specific intent to improperly cause Defendant McNair to commit a specific act in favor of [PUGH], or with the specific intent of illegally rewarding Defendant McNair for having previously committed such an act. In other words, the United States must show that [PUGH] provided the item of value either (1) with the expectation that Defendant McNair would improperly provide something specific in return or (2) for the purpose of rewarding McNair for something improper that Defendant McNair had previously done.

In the *Swann* trial, Bobby Rast, for example, requested this instruction:

> [Y]ou must find beyond a reasonable doubt that Bobby Rast gave something of value to Defendant Swann with the specific corrupt intent of obtaining a *quid pro quo,* that is, that Bobby Rast gave the item of value with the specific corrupt intent to improperly influence Defendant Swann to commit a specific official act in favor of Bobby Rast, or with the specific corrupt intent of illegally rewarding Defendant Swann for having previously committed such an act. In other words, the United States must show that Bobby Rast corruptly provided the item of value either (1) with the expectation that Defendant Swann would improperly provide some official specific act or acts in return or (2) for the purpose of rewarding Jack W. Swann for some specific improper official act or acts that Defendant Swann had previously done.

In the *McNair* trial, the district court rejected the proposed *quid pro quo* instructions, gave the Eleventh Circuit's pattern jury instructions for § 666 as to corruptly giving bribes, telling the jury:

> As I've said, the defendants, other than Jewell C. "Chris" McNair, are charged in various counts of violating a portion of Title 18, Section 666, which makes it a federal crime or offense for anyone to corruptly give, offer or agree to give anything of value to anyone who is an agent of a local government receiving significant benefits under a federal assistance program intending to reward or influence that agent in connection with any business, transaction, or series of transactions of such local government involving anything of value of $5,000 or more.
>
> . . . .
>
> Fifth: And this is another thing that the government would have to prove beyond a reasonable doubt.
>
> That each such gift, offer or agreement to give, that by each of those gifts, offer or agreement to give, the Defendant [ ] corruptly intended to reward or influence Jewell C. "Chris" McNair in connection with a transaction, or series of transactions, with Jefferson County, Alabama, which transaction or series of transactions involved something of value of $5,000 or more.
>
> Sixth: That in doing so, the Defendant [ ] acted corruptly.

> An act is done "corruptly" if it is performed voluntarily, deliberately, and dishonestly, for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means.[47]

The district court also gave the pattern § 666 jury charge, with slight variations, as to corruptly receiving bribes. The judges in the subsequent trials (*Swann*,[48]

---

[47] *See* Eleventh Circuit Pattern Jury Instructions (Criminal Cases) at 180-81 (Offense Instruction 24) (2003). The district court instructed the jury the government must prove all elements of a § 666 crime, such as that McNair had to be an agent and the County had to receive over $10,000 in federal funds. We quote in the text only the part of the pattern charge about the corrupt intent element.

[48] In the *Swann* trial, the district court instructed the jury as to corruptly accepting bribes:

> As to [the § 666 substantive bribery] counts the defendant Jack W. Swann can be found guilty of [§ 666 bribery] only if all the following facts are proved beyond a reasonable doubt.
>
> . . . .
>
> The fifth element which is common to all of those counts as the first four were, that . . . by such acceptance or agreements, the defendant Jack W. Swann intended as to the count under consideration to be influenced or rewarded in connection with a transaction or series of transactions of Jefferson County, Alabama which transactions or series of transactions involve something of value of $5,000 or more.
>
> And six, that in so doing the defendant Jack W. Swann acted corruptly.
>
> An act is done corruptly if it is performed voluntarily and deliberately and dishonestly for the purpose of

(Continued on following page)

Barber,[49] and *Wilson*[50]) agreed with the district court's ruling in the *McNair* trial and gave jury instructions

---

> either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by any unlawful method or means.
>
> The court gave a similar pattern § 666 jury charge as to corruptly giving bribes.

[49] In the *Barber* trial, the district court instructed the jury as to only PUGH's corruptly giving bribes because Barber, the acceptor, pled guilty:

> The defendant Roland Pugh Construction, Inc., can be found guilty of the offense charging a violation of [§ 666(a)(2)] only if all the following facts are proved beyond a reasonable doubt:
>
> . . . .
>
> Fifth, that by giving, offering, or agreeing to give things of value to Clarence R. Barber, defendant Roland Pugh Construction, Inc., intended to influence or reward Clarence R. Barber in connection with any business transaction or series of transactions which involve something of $5,000 or more.
>
> And, sixth, that in doing so, the defendant Roland Pugh Construction, Inc., acted corruptly.
>
> . . . .
>
> An act is done corruptly if it is performed voluntarily, deliberately, and dishonestly for the purpose of either accomplishing an unlawful end or result, or of accomplishing some otherwise lawful end or result by any unlawful method or means.

[50] Because in the *Wilson* case only PUGH appeals, we quote the "corruptly giving" part of the court's jury charge:

> The purpose of the plan alleged by the government in the indictment was also for the defendant, Pugh Incorporated, through Grady R. Pugh, Jr., to corruptly give, offer, and agree to give things of value to defendant Ronald K. Wilson with the intent of influencing

(Continued on following page)

that did not include defendant-appellants' requested *quid pro quo* instructions.[51]

Given our conclusion that § 666(a)(1)(B) and (2) do not require proof of a specific *quid pro quo*, defendant-appellants' proposed jury instructions containing that requirement were incorrect statements

---

> and rewarding him for supporting their interests in connection with the J.C.E.S.D. sewer rehabilitation construction program in violation of [18 U.S.C. § 666(a)(2)].
>
> . . . .
>
> Title 18 of the United States Code section 666(a)(2) makes it a federal crime or offense for any person to corruptly give, offer, or agree to give anything of value to any person with the intent to influence or reward an agent of a local government or local governmental agency receiving significant benefits under a federal assistance program, in connection with any business, transaction or series of transactions of such local government or government agency involving anything of value of $5,000 or more.
>
> . . . .
>
> An act is done corruptly if it is performed voluntarily, deliberately, and dishonestly for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful result by any unlawful method or means.

[51] "In considering the failure of a district court to give a requested instruction, the omission is error only if the requested instruction is correct, not adequately covered by the charge given, and involves a point so important that failure to give the instruction seriously impaired the party's ability to present an effective case." *Svete*, 556 F.3d at 1161 (quotation marks omitted). The district court's refusal to give a requested instruction is reviewed for abuse of discretion. *Id.*

of law. Thus, the district courts did not abuse their discretion in refusing them. *See US Infrastructure,* 576 F.3d at 1213 (determining omission of a specific *quid pro quo* requirement in § 666 jury instruction was not plain error); *Paradies,* 98 F.3d at 1289 (same).

In the *McNair* trial, all defendant-appellants also requested that the jury be instructed that if a thing of value was given out of friendship or merely to foster goodwill and not to corruptly influence or reward, then a not-guilty verdict is required. After that request, the district court in the *McNair* trial supplemented the pattern instructions with this:

> Section 666 . . . does not prohibit all gifts by or to a public official, does not prohibit all receipts – does not prohibit receipt of all gifts by or to a public official, but only gifts received with the corrupt intent to be influenced or rewarded by that governmental official in connection with a business or transaction or series of transactions of that governmental entity involving $5,000 or more.[52]

---

[52] In the *Swann, Barber,* and *Wilson* trials, PUGH also requested the same jury charge. The Rast and Pugh defendants either requested this jury instruction or adopted PUGH's request, in the *Swann* trial. And in the *Swann, Barber,* and *Wilson* trials, the district court gave similar supplemental jury charges expressly advising the jury that § 666 does not prohibit all gifts to a public official, but only those gifts with the corrupt intent to influence or reward specified government officials in

(Continued on following page)

After the defendant-appellants insisted the district court specifically identify friendship and goodwill gifts as legal gratuities, the court responded "if it's corrupt and dishonest, it's not for good will, is it?" The district court explained that giving defendant-appellants' instruction would "carr[y] with it some sort of suggestion that I'm adopting that idea that that's what these payments were." This exchange then took place:

> THE COURT: What if it's good will and corrupt?
>
> [ROLAND PUGH'S COUNSEL]: It can't be.
>
> THE COURT: Okay. That's your answer.

A finding that a gift was made or accepted with corrupt intent necessarily excludes friendship and goodwill gifts. There is no reversible error in the court's charge in this regard.[53]

---

connection with the business or transaction or series of transactions of that governmental entity.

[53] We also find no merit to defendant-appellants' claims on appeal as to any other proposed jury instructions because they were either incorrect, too argumentative or flawed in some way, not necessary, or already adequately covered by the court's charge as a whole. In particular, we conclude the court's charge adequately covered defendants' theory of defense that the payments were gifts made out of friendship or to foster good will and adequately charged the jury on the honest services mail fraud counts (90-100) as discussed later.

VII. SUFFICIENCY OF THE EVIDENCE

A. Conspiracy and Corrupt Intent

All defendant-appellants challenge the sufficiency of the evidence to support their convictions on various counts.[54] Defendants' primary arguments are the government failed to prove a conspiracy among the defendants (as to Counts 1, 51, 75, and 78) or any corrupt intent as to all the bribery counts.[55]

To sustain the conspiracy convictions, the government must prove (1) "the existence of an agreement to achieve an unlawful objective, here, giving things of value" to County employees with the corrupt intent to influence or reward them; (2) "the defendant[s']

---

[54] "This Circuit reviews the sufficiency of the evidence *de novo*, examining the evidence in the light most favorable to the government and resolving all reasonable inferences and credibility issues in favor of the guilty verdicts." *US Infrastructure*, 576 F.3d at 1203. We "will not overturn a conviction on the grounds of insufficient evidence unless no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Wright*, 392 F.3d 1269, 1273 (11th Cir.2004) (quotation marks omitted).

[55] Defendants PUGH, Roland Pugh, Yessick, RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty were convicted on Count 1 for participating in a conspiracy to bribe defendant McNair. Defendants PUGH, Yessick, RAST, Bobby Rast, FWDE, and Dougherty were convicted on Count 51 of participating in a conspiracy to bribe defendant Swann. Defendants PUGH and Wilson were convicted on Count 75 of participating in a conspiracy (between PUGH, Grady Pugh, and Wilson) to bribe Wilson. Defendant PUGH was convicted on Count 78 of participating in a conspiracy (between PUGH, Roland Pugh, Barber, and Yessick) to bribe Barber.

knowing and voluntary participation in the conspiracy;" and (3) "an overt act in furtherance of the conspiracy." *US Infrastructure,* 576 F.3d at 1203; *see also United States v. Jennings,* 599 F.3d 1241, 1250-51 (11th Cir.2010). Defendants argue the government failed to present any evidence of an agreement among them.

The problem for defendants is direct evidence of an agreement is unnecessary; the existence of the agreement and a defendant's participation in the conspiracy may be proven entirely from circumstantial evidence. *Id.*; *United States v. Massey,* 89 F.3d 1433, 1439 (11th Cir.1996). "A defendant may be found guilty of conspiracy if the evidence demonstrates he knew the 'essential objective' of the conspiracy, even if he did not know all its details or played only a minor role in the overall scheme." *United States v. Guerra,* 293 F.3d 1279, 1285 (11th Cir.2002). The government need not show "each defendant had direct contact with each of the other alleged co-conspirators." *Id.* "It is not necessary for the government to prove that a defendant knew every detail or that he participated in every stage of the conspiracy." *United States v. Jones,* 913 F.2d 1552, 1557 (11th Cir.1990). "For a wheel conspiracy to exist those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise." *United States v. Fernandez,* 892 F.2d 976, 986 (11th Cir.1989) (quotation marks omitted). "[A] common purpose or plan may be inferred from a development

and collocation of circumstances." *US Infrastructure*, 576 F.3d at 1205 (quotation marks omitted).

Extensive witness and documentary evidence firmly established that the things of value described in the conviction counts were given by the contractor-defendants and accepted by McNair, Swann, Barber, Wilson, and other County employees. The defendants in the *McNair* and *Swann* trials mainly dispute whether the government proved they acted (1) with corrupt intent (versus for friendship), and (2) in agreement (versus independently). The government presented more than sufficient evidence of both corrupt intent and a conspiracy agreement.

First, ample evidence showed that the contractor-defendants worked together on McNair's studio and Swann's home and that they did so with a common purpose of providing sizable benefits to influence McNair and Swann in the billion-dollar sewer rehabilitation program. There was no evidence of gifts to these "friends" before the sewer projects began. Instead, the gifts to McNair and Swann and other County employees were made during the same time period of the sewer projects. The large sums – both in bribes and sewer payments – indicate a common scheme of all defendant-appellants to receive County sewer money through illegal means. The jury was free to disbelieve the defendants' claims of gifts for friendship and to find corrupt intent to influence McNair and Swann in connection with the County's massive sewer payments to the contractor-defendants. The juries could readily believe the gifts worth hundreds

of thousands of dollars to McNair and Swann after the sewer work began were actually bribes intended to make sure the contractors profited excessively from the work. In fact, the evidence recounted above showed pervasive and entrenched corruption.

Second, the evidence of how the contractor-defendants divided up and coordinated their work on the same personal projects for McNair (his studio) and Swann (his home) during the same time frame is strong evidence of a conspiracy. For example, FWDE's Bailey supervised the construction of McNair's studio while PUGH and RAST provided labor and materials. RAST furnished the labor to build the deck, and PUGH furnished the materials. RAST excavated for the footings, and PUGH ordered the concrete and poured concrete walls. FWDE paid Mosley Construction for the wood framing initially, and then RAST began paying Mosley. FWDE ordered the aluminum handrails, PUGH paid for them, and RAST installed them. The same pattern of dividing up the work was followed for the Swann home. For example, an FWDE employee supervised the work at Swann's home. PUGH's Yessick hired a company to install a koi pond for Swann, and PUGH listed Danny Rast as a point of contact.[56]

---

[56] In addition, after McNair's retirement, PUGH, FWDE, and Bobby Rast each gave McNair a check for the same amount – $5,000 – all within a two-day period.

Third, the extent to which the parties went to conceal their bribes is powerful evidence of their corrupt intent. For example, evidence in the *McNair* trial showed FWDE employed Bailey as a full-time construction superintendent for the McNair studio renovation and reported Bailey's time as purportedly performed on a JCESD sewer project. FWDE concealed a $50,000 payment Dougherty made to subcontractor George Word Construction for building McNair's Arkansas retirement home.[57] FWDE has no record of the transaction at all. The only existing record of this transaction was made by a bookkeeper, who copied the invoice and check and kept them at home because of his suspicions. FWDE also supplied a construction superintendent, Hendon, for Swann's home remodel. For nearly two years, Hendon was on FWDE's payroll but actually spent half of every workday at Swann's home. FWDE's Stanger replaced Hendon for an additional nine months. Dougherty was aware of this work at Swann's home. FWDE paid a subcontractor over $28,000 – with checks signed by Dougherty – to frame the addition to Swann's home.

Likewise, RAST paid nearly $77,000 for materials and subcontractors for McNair's studio. RAST also supplied significant amounts of labor for

---

[57] Earlier, PUGH had paid Word $44,192.75 in the first half of October 2001, and, per Yessick's instruction, internally charged the expense to miscellaneous jobs/construction materials. McNair told George Word that FWDE would make the next payment.

McNair's studio, including excavating for the footings and constructing its deck and metal steps. RAST hid these expenses by coding them to JCESD projects.

After a newspaper article revealed RAST's work on Swann's home, Bobby Rast told his bookkeeper that they "didn't need any document invoices in the files with Jack Swann's or Chris McNair's shipping address on them," causing her to discard these invoices. Before the article, RAST had treated its payments to McNair and Swann as business expenses, deducting them on its tax returns. After the article, RAST amended several years' returns to eliminate more than $140,000 of those deductions.[58]

Similarly, RAST crews performed demolition work and poured concrete for the basement, walls, stairs, and elevator pit at Swann's home. RAST also spent more than $28,000 purchasing concrete and bricks and paying subcontractors to repair the plumbing, paint Swann's home, and install hardwood floors and stairs. As with McNair, RAST concealed its work for Swann, in particular avoiding the use of Swann's name on invoices, delivery tickets, and accounting

---

[58] Sufficient evidence also supports the Rast defendants' convictions for bribing Chandler and Ellis. First, Chandler asked Bobby Rast for money to attend technical conferences that Ellis was also planning to attend. Instead of giving Chandler a check for $250-$500 as Chandler expected, Bobby Rast gave Chandler an envelope containing $5,000 cash and told Chandler to split it with Ellis.

reports, and coding the work and expenses either to miscellaneous or JCESD projects.

PUGH also concealed its work on McNair's studio. For example, when Besco delivered steel to McNair's studio, Besco's delivery tickets identified PUGH and Yessick as its customer and indicated that some of the steel was for the Valley Creek Treatment Plant, a JCESD sewer job on which PUGH was the contractor and FWDE the consulting engineer.

Defendants claim they could not have intended to corruptly influence McNair because his authority was purely "ministerial," since he only ratified what JCESD officials below him (such as Swann) had already approved. Given McNair's ultimate authority and responsibility, a jury could infer McNair became a "rubber-stamp" for the defendants' pay requests, field directives, and contract modifications that crossed his desk because of the large sums in goods and services he received from the contractor-defendants. And because he was responsible for placing sewer items on the County Commission's weekly agenda, McNair controlled every sewer matter requiring Commission approval.[59]

---

[59] Defendants also contend the government failed to prove any specific payment (or work on McNair's studio or Swann's home) was given or done in exchange for a specific official act by McNair or Swann. Because a specific *quid pro quo* is not an element of a § 666(a)(1)(B) or (a)(2) crime, there was necessarily no failure of proof as to that element.

(Continued on following page)

B. PUGH's Challenges to Counts 75 and 78

PUGH challenges the sufficiency of the evidence as to its bribery conspiracy convictions on Count 75 (the Wilson scholarship) and Count 78 (land and vacations for Barber). However, ample evidence supports both convictions.

The evidence established that when Grady Pugh gave Wilson's son the scholarship, he expected Wilson to return the favor. Grady Pugh testified that when he provided the Wilson scholarship, he "felt like if [Wilson] got a chance to help us and return the favor, he would." Only three days after Wilson faxed Grady Pugh information as to where PUGH should send the scholarship check – and the day before Grady Pugh sent it – Wilson approved PUGH's request for a time extension that had been sitting on Wilson's desk for four weeks. When PUGH submitted its extension request, PUGH was already exposed to liability of $76,000 in liquidated damages. The amount of

---

Alternatively, even assuming these § 666 crimes require, as the Second Circuit concluded in *Ganim*, that the government prove payments or such work were given or done in return for a promise of as yet unidentified future conduct favorable to the contractor-defendants in their County sewer projects, the evidence overwhelmingly established such facts and thus any error in the jury charge was harmless. And even under the Fourth Circuit's approach in *Jennings*, which requires a "course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor," the evidence here was sufficient, and thus any jury charge error was harmless. *Jennings*, 160 F.3d at 1014.

exposure exceeded $100,000 by the time Wilson actually granted PUGH's request.

The evidence also supports the verdict that PUGH and Yessick conspired to bribe Barber. Barber oversaw all of the JCESD inspectors and awarded the no-bid emergency work contracts. In 1997, 1998, 1999, and 2001, PUGH paid for Barber's vacations, but hid the payments in the company's books. PUGH readily agreed to Barber's June 2000 request to buy him a lot for a retirement home. PUGH's Yessick contracted for the lot in Roland Pugh's name but charged $45,000 to the Paradise Lake project to pay for it. Then, just before the closing, PUGH instead gave Barber a cashier's check to buy the lot in his own name. The remitter's name was left blank on that check. Yessick was told to retrieve all evidence that PUGH was ever involved. This required the realtor to fabricate a fictitious house sale to refund the original $1,000 deposit.

Moreover, just months before Barber solicited PUGH for the purchase of the lot, Barber designated the Paradise Lake project as an emergency. Because the cost of the project – $827,417.75 – greatly exceeded Barber's $50,000 emergency work approval limit, and because there was no Paradise Lake contract on which to grant a field directive, the work was performed as a field directive on the unrelated multimillion dollar Cahaba River project. PUGH netted a profit of more than $400,000.

PUGH argues the Wilson scholarship and Barber land transaction are not bribery conspiracies, but merely "buyer-seller" transactions. PUGH relies primarily on two drug cases, *United States v. Mercer,* 165 F.3d 1331, 1335 (11th Cir.1999) (cash for drugs), and *United States v. Dekle,* 165 F.3d 826, 830-31 (11th Cir.1999) (sex for drugs), for the proposition that there is no conspiracy where there is merely a "buy-sell transaction" without an "agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction." *Mercer,* 165 F.3d at 1335 (quotation marks omitted). PUGH argues that there was nothing agreed upon with Wilson or Barber outside of the one gift or one buy-sell transaction. The drug cases of *Mercer* and *Dekle* are materially different from § 666 bribery conspiracy cases. In a drug deal, once the sale is complete, there is no further criminal objective. In § 666 cases, once the gift is made, the defendant typically intends to corruptly influence the County employee's future actions. *See United States v. Tilton,* 610 F.2d 302, 307 (5th Cir.1980)[60] (bribee conspired with briber in part because of common goal of increasing their personal wealth). In § 666 cases, the defendants share both an anticipation of future action and a common goal of increasing their wealth illegally.[61]

---

[60] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

[61] To the extent defendant-appellants make sufficiency of the evidence arguments as to any other § 666 conviction counts, we reject them as without merit.

C. Swann and PUGH's Challenges to Counts 90-100

In the *Swann* trial, Swann, PUGH, and Yessick were convicted of eleven counts (90-100) of honest services mail fraud under §§ 1341 and 1346. The convictions involve Swann's receiving landscaping services worth $140,000 from PUGH and Yessick. On appeal, Swann and PUGH claim the evidence was insufficient to support their convictions.[62]

To establish a violation of § 1341, the government must show the defendant "(1) intentionally participates in a scheme or artifice to defraud another of money or property, and (2) uses or 'causes' the use of the mails . . . for the purpose of executing the scheme or artifice." *United States v. Ward,* 486 F.3d 1212, 1222 (11th Cir.2007).[63]

---

[62] Yessick does not appeal. On appeal, Swann and PUGH do *not* challenge the constitutionality of the honest services statute. Instead, Swann raises two claims: (1) insufficient evidence to sustain his §§ 1341, 1346 convictions, and (2) the district court erred by refusing to give a "good faith" instruction to the jury. PUGH adopted Swann's claim of insufficient evidence.

[63] Section 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such

(Continued on following page)

Section 1346 adds "honest services" language to the § 1341 offense, providing that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. "To prove 'honest services' mail fraud, the Government must show that the accused intentionally participated in a scheme or artifice to deprive the persons or entity to which the defendant owed a fiduciary duty of the intangible right of honest services, and used the United States mails to carry out that scheme or artifice." *United States v. Browne,* 505 F.3d 1229, 1265 (11th Cir.2007). When a public official "secretly makes his decision based on his own personal interests – as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest – the official has defrauded the public of his honest services." *United States v. Lopez-Lukis,* 102 F.3d 1164, 1169 (11th Cir.1997).

Here, Swann received approximately $100,000 in landscaping and lawn maintenance from a company (PUGH) that he had the power to favor in the sewer rehabilitation program. In the summer of 2000, after Swann told PUGH's Yessick he had overspent in

---

carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341.

remodeling his house, Yessick hired Guthrie Landscaping to landscape Swann's two properties. By December 2001, PUGH had paid Guthrie more than $93,000, including $1,200 per month in 2001 for lawn maintenance. In January 2002, Yessick asked Guthrie to stop submitting invoices to PUGH and instead advanced Guthrie $47,000 for three years of landscaping and maintenance. PUGH paid a total of approximately $140,000 to Guthrie for landscaping work for the Swanns.[64]

Although Swann contends there was "no bribe" and none of this was "done in secrecy," the evidence shows PUGH and Swann took steps to conceal any record of the services provided to Swann. Guthrie mailed its invoices to PUGH and, at Yessick's request, identified the work by job number only. Yessick directed PUGH's controller to charge the expense to the Metro Park Roadway, a County job. Guthrie's invoices were never found in PUGH's files.

After Swann and Yessick learned of the investigation, Guthrie was abruptly asked to stop working at Swann's home, even though there was a balance remaining on its $47,000 advance. In August and September 2002, approximately two years after hiring Guthrie, Yessick directed his assistant to

---

[64] In addition to the substantive bribery counts against Swann (Count 52) and PUGH (Count 61) for these landscaping services, both defendants were convicted of separate counts (Counts 90-100) of honest services mail fraud for payments PUGH made by mail to Guthrie.

create invoices to Swann's mother and mother-in-law for landscaping, tree removal, and "remodeling work." The Swanns then took out home equity loans in the names of their mothers, and wrote two checks to PUGH totaling approximately $59,000 on joint accounts they held with their mothers. Yessick gave these checks directly to PUGH's controller, telling her they were partial payment for $105,000 in landscaping work PUGH had done, which work he had previously directed her to record as "miscellaneous AR." Yessick told the controller to credit the $59,000 in checks to PUGH as "miscellaneous income" and "to write off" the approximately $46,000 that remained.

Swann contends that PUGH merely located the landscaping contractor and that he always intended to reimburse PUGH for payments to Guthrie. However, PUGH and Swann concealed the landscaping arrangement. The concealment itself is strong evidence that Swann accepted these services not as a loan, but as a bribe. *See United States v. Hunt,* 521 F.3d 636, 646-47 (6th Cir.2008), *cert. denied,* ___ U.S. ___, 129 S.Ct. 2157, 173 L.Ed.2d 1155 (2009); *United States v. Dial,* 757 F.2d 163, 170 (7th Cir.1985).

Swann also claims he was unable to, and did not, assist PUGH in any way. Yet, five days after PUGH's President Yessick hired Guthrie to landscape Swann's two properties, Swann granted a 180-day extension for PUGH's joint venture on the Vestavia Trunk project. That extension saved PUGH's joint venture $180,000 in potential liquidated damages. Two months earlier, Swann had denied a 120-day extension request on the

same project, noting that timely completion of the project was "a requirement of the specifications." And in 2000, Swann approved a $827,417.75 field directive for PUGH's Paradise Lake project and caused it to be charged to the unrelated Cahaba River project. As noted earlier, Barber had designated the project as an emergency, and then Swann later approved this field directive.

The evidence fully supports the jury's guilty verdict on Counts 90-100 as to Swann and PUGH.[65]

D. Roland Pugh's Arguments

Roland Pugh challenges the sufficiency of the evidence to support his conviction for conspiracy to commit bribery of McNair (Count 1). Roland Pugh also argues the government failed to prove a "wheel" or "hub and spoke" conspiracy because there was no

---

[65] Swann also claims the district court erred by refusing his proposed jury instruction that good faith is a complete defense to mail fraud. The district court instructed the jury that to convict, it must find beyond a reasonable doubt that defendants "knowingly devised or participated in a scheme to fraudulently deprive the public of an intangible right of honest services" and did so willfully with intent to defraud. The court defined "intent to defraud" as "to act knowingly and with the specific intent to deceive someone." Because a finding of specific intent to defraud necessarily excludes a finding of good faith, Swann's requested instruction was "substantially covered by other instructions that were delivered," and Swann has shown no error in the refusal to give his requested good faith charge. *United States v. Opdahl*, 930 F.2d 1530, 1533 (11th Cir.1991) (quotation marks omitted).

evidence he knew the Rast and Dougherty defendants (the other "spokes") were bribing McNair (the "hub").

This ignores the fact that Roland Pugh directed Grady Pugh to fly McNair's daughter and FWDE's superintendent Bill Bailey (who was overseeing construction at McNair's studio) on the PUGH company airplane to Georgia to pick out carpet for McNair's studio. Before take-off, Roland Pugh told Grady Pugh that "McNair has called now and says that he's broke and he doesn't have enough money to leave for the deposit on the carpet. So, if you would, write a check for the deposit." Grady Pugh paid the deposit with a $4,820 PUGH check and had it treated on the company's books as an expense on the "last rehab contract."[66]

Roland Pugh also gave McNair money in connection with the project to develop McNair's studio. When the project began, Roland Pugh told PUGH's other three owners, Grady Pugh, Andy Pugh, and Yessick, that they had to give money to McNair because he was building a studio and, as ten percent owners, they had to "kick in" their ten percent. Grady Pugh gave approximately $1,500 in cash to Roland Pugh's secretary that time to give to McNair.[67]

---

[66] Grady Pugh's testimony in this regard was corroborated by Bill Bailey's testimony.

[67] We reject Roland Pugh's claim that his conspiracy conviction falls outside of the statute of limitations because no member of the "Pugh spoke" committed an overt act after August 26,

(Continued on following page)

On another occasion, Roland Pugh collected money from the three other PUGH owners to give to McNair for his studio. On July 18 and 19, 2000, three of them wrote checks to cash in proportion to their ownership interests. (Roland Pugh: $7,000, Andy Pugh: $1,000, Yessick: $1,000). Roland Pugh gave Grady Pugh an envelope of money and asked him to give it to McNair. Grady Pugh took it to McNair's studio where he saw FWDE's Bailey and told Bailey he (Grady Pugh) was there to help McNair, and that it was "financial help" that McNair needed at that time. Grady Pugh then visited with McNair for a few minutes and set the envelope down between the seats of the van they were in as McNair watched. After McNair retired, Roland Pugh complained to Grady Pugh about McNair's demand for help building a retirement home, saying that "surely this is the last

---

2000. The Rast and Dougherty defendants took actions in furtherance of the conspiracy well within the statute of limitations. "[A]n individual conspirator need not participate in the overt act in furtherance of the conspiracy. Once a conspiracy is established, and an individual is linked to that conspiracy, an overt act committed by any conspirator is sufficient." *United States v. Thomas,* 8 F.3d 1552, 1560 n. 21 (11th Cir.1993). Because Roland Pugh had joined the conspiracy to bribe McNair and because that conspiracy continued into the statute of limitations period, Roland Pugh's conviction stands even if he took no actions within that period. The district court properly instructed the jury that it could convict Roland Pugh if any co-conspirator committed an act after August 26, 2000.

time we'll have to do anything for him since he's out of office."[68]

Later, after McNair asked Roland Pugh to pay for the studio's $40,000 air conditioning system, Roland Pugh gathered funds by writing checks to his daughters-in-law and to cash. Once again, Grady Pugh delivered an envelope of cash to McNair, this time at his house.

As a result, there was sufficient evidence for the jury to convict Roland Pugh and to find that he was aware of at least some of the other co-conspirators, such as FWDE and FWDE's Bailey, given that they were working on separate parts of a larger project. Accordingly, we reject Roland Pugh's sufficiency of the evidence challenge to his conviction on Count 1.

The cases Roland Pugh relies on are inapposite. In *United States v. Chandler,* 388 F.3d 796, 807-08 (11th Cir.2004), the "hub" of the conspiracy ensured "there was no connection whatsoever between the various spokes," and the spokes "knew nothing about each other." The evidence here shows that Roland Pugh was aware not only of PUGH, Yessick, and

---

[68] Roland Pugh cites the drug case of *United States v. Mercer,* 165 F.3d at 1335-36, for the proposition that there is no conspiracy where there is merely a "buy-sell transaction." As explained earlier, *Mercer* is materially different from § 666 bribery conspiracy cases. In any event, Roland Pugh's argument lacks merit as to Count 1 because there is ample evidence that persons other than Roland Pugh and McNair were involved in the transactions in the bribery conspiracy.

Grady Pugh's involvement in the McNair project, but also that of the Dougherty and Rast defendants' involvement. For the same reason, *United States v. Glinton,* 154 F.3d 1245 (11th Cir.1998), is not on point. *Id.* at 1251 n. 5 (concluding "hub and spoke" conspiracy must have "some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object") (quotation marks omitted).

E. McNair's Arguments Regarding Dawson

The evidence at the *McNair* trial showed McNair's conviction for accepting a bribe from Dawson is adequately supported. Dawson's firm received millions of dollars in no-bid engineering contracts from McNair, and the vast majority of Dawson's work was on JCESD contracts. McNair solicited the studio's $16,400 audio-video system from Dawson. Dawson "was uncomfortable with the whole situation" and would not have agreed if McNair was not part of the sewer rehabilitation process, so he had the store conceal the delivery address on the invoice.

VIII. 404(B) EVIDENCE

All defendant-appellants challenge the admission of other bad acts evidence under Federal Rule of Evidence 404(b).[69] Specifically, they contend the

---

[69] A district court's evidentiary rulings under Federal Rule of Evidence 404(b) are reviewed only for "a clear abuse of

(Continued on following page)

district courts erred by admitting, for example, Swann-bribe evidence in the *McNair* trial and McNair-bribe evidence in the *Swann* trial.

> Federal Rule of Evidence 404(b) provides:
>
> > Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Fed.R.Evid. 404(b). This Court uses a three-part test to determine whether other bad acts are admissible under Rule 404(b):

> > First, the evidence must be relevant to an issue other than the defendant's character; Second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; Third, the probative value of the evidence must not be substantially outweighed by its undue prejudice. . . .

United States v. Matthews, 431 F.3d 1296, 1310-11 (11th Cir.2005) (quotation marks omitted). "[I]n every

---

discretion." *US Infrastructure,* 576 F.3d at 1208. "[T]his Court 'will not hold that the district court abused its discretion where it reached the correct result even if it did so for the wrong reason.'" *Id.* (quoting *United States v. Samaniego,* 345 F.3d 1280, 1283 (11th Cir.2003)).

conspiracy case, a not guilty plea renders the defendant's intent a material issue. Evidence of such extrinsic evidence as may be probative of a defendant's state of mind is admissible unless the defendant affirmatively takes the issue of intent out of the case." *Id.* at 1311 (alterations and internal quotation marks omitted).

Moreover, Rule 404(b) does not exclude evidence that is "inextricably intertwined" with evidence of the charged offense. *United States v. Wright,* 392 F.3d 1269, 1276 (11th Cir.2004); *United States v. Aleman,* 592 F.2d 881, 885 (5th Cir.1979). Rule 404(b) does not exclude evidence that is "linked in time and circumstances with the charged crime" or that "forms an integral and natural part of an account of the crime to complete the story of the crime for the jury." *Wright,* 392 F.3d at 1276 (quotations omitted); *United States v. Edouard,* 485 F.3d 1324, 1344 (11th Cir.2007).

We conclude the contested evidence was admissible for three reasons. First, the evidence was inextricably intertwined with evidence of the charged bribery offenses. Second, even if not inextricably intertwined, this evidence was relevant to show corrupt intent and admissible under 404(b). Defendant-appellants expressly argued they lacked corrupt intent and gave gifts to McNair and Swann out of

friendship and good will.[70] Evidence that the contractor-defendants gave things of value to Swann in McNair's trial and to McNair in Swann's trial was highly probative of the contractor-defendants' intent. *See Edouard,* 485 F.3d at 1345 (concluding extrinsic evidence is relevant "where the state of mind required for the charged and extrinsic offenses is the same"). Moreover, evidence of similar conduct that occurs during the same time period has "heightened" probative value. *Jones,* 913 F.2d at 1566. Indeed, the district court judge, in the *McNair* trial, explained in a pre-trial order:

> While the jury might conceivably find that the defendant felt such a strong sense of friendship with McNair that they would give him substantial gifts or make him substantial loans, the fact that they gave alleged "gifts" or made "loans" to others involved with the same or similar projects would certainly be relevant to the issues of "motive" and "intent." It could also bear on "plan" . . . [and i]f the projects are the same or similar, they may well be a part of the same "series of transactions." . . . [W]hat might arguably be a "gift" to one person becomes less likely a gift if the

---

[70] Roland Pugh does not stress lack of corrupt intent because he claims he was not involved at all in any gift. Other than Roland Pugh, defendants do not argue things of value were not given by them to County officials, but they claim they were gifts, not bribes.

"gifts" are widespread to others involved with the same or similar projects.[71]

Similarly in the *Swann* trial, another district court judge found that this sort of evidence of intent is "exactly what 404(b) testimony is here for."

Third, the evidence was admissible under 404(b) to show the contractor-defendants' common plan and motive. Specifically, the evidence showed a common plan of bribing County officials controlling the sewer projects by providing them with work on their personal homes or businesses and working together to do so during the same time frame of the sewer projects. For example, in the *McNair* trial, evidence showed – just as FWDE's Bailey was supervising, and RAST and PUGH were providing labor and materials for the McNair studio expansion – FWDE's Stanger was supervising and using a RAST credit card to purchase materials for Swann's separate home renovation. Similarly, in the *Swann* trial, the evidence showed that RAST sent Luke Cobb to pour a concrete foundation for McNair's studio, just as he had done for the expansion of Swann's home, and that PUGH had provided Chandler with landscaping, just as it did for Swann. Indeed, the evidence recounted at length above gives repeated examples of how the 404(b)

---

[71] The *McNair* judge stated in a subsequent order, "[t]he offenses were similar and temporally close. The 404(b) evidence was clearly appropriate to meet the government's requirement to prove intent."

evidence was relevant to show both corrupt intent and a common plan and motive.

Furthermore, the district courts in both the *McNair* and *Swann* trials gave limiting instructions for the 404(b) evidence several times during the trials. *See United States v. Diaz-Lizaraza,* 981 F.2d 1216, 1225 (11th Cir.1993) (concluding prejudice could be mitigated by giving a cautionary instruction on the limited use of such evidence). In the *McNair* trial, for example, after testimony of Dougherty's contributions to Swann's remodeling, the court instructed in part:

> This evidence is being allowed for the limited purpose, with respect to Mr. Dougherty, as to what Mr. Dougherty's intent may have been at the time that he may have made payments, or contributions, or gifts, to Mr. McNair. Not that Mr. McNair is charged with receiving anything in connection with Mr. Swann's house.
>
> But the evidence is allowed for the purpose of your considering that if Mr. Dougherty was making some sort of payments, or contributions, or gifts, on behalf of Mr. McNair; and if he was also making some sort of gifts, or payments, or contributions on behalf of Mr. Swann, you can consider that combination with regard to your determination, which will be a necessary determination for you to make, as to what Mr. Dougherty and his company's intent was, and the nature of

> that intent, whether it be corrupt or otherwise, at the time he made gifts, or contributions, or payments, on behalf of Mr. McNair.

In the *Swann* trial, the court gave similar limiting instructions several times.[72]

And the jury acquitted some defendants on some counts while convicting them on others. This further demonstrates the jury was not confused and could segregate the 404(b) evidence from other evidence.

---

[72] In the *Barber* and *Wilson* trials, the district courts admitted 404(b) evidence but gave similar limiting instructions several times.

For the first time on appeal, Swann contends that the limiting instructions were not specific enough because they did not always identify by name the defendant against whom the 404(b) evidence was not being offered. We review this issue for plain error. *See infra* section XII.D. Where, as here, the district court's instructions accurately reflect the law, this Court gives "wide discretion as to the style and wording employed. . . . " *United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir.1995). Moreover, at several times during trial, the district court specifically offered to name defendants against whom the evidence was not offered, and appellants – including Swann – declined:

> COURT: I have asked y'all that every single time we have given a limiting instruction if you want me to use specific names and I have been told no up to this point. . . . I want you to know I am willing to sit here and tell you the names. I think it would be appropriate, but you are asking me not to; is that right?
>
> [SWANN'S COUNSEL]: Yes, sir.

Swann has not shown reversible error, plain or otherwise, in any of the jury instructions.

United States v. Prosperi, 201 F.3d 1335, 1346 (11th Cir.2000) ("A discriminating acquittal also can signal that the jury was able to sift through the evidence properly."); *United States v. Coy,* 19 F.3d 629, 635 (11th Cir.1994) (concluding that a split verdict demonstrates "absence of confusion" for 404(b) purposes).[73]

Defendant-appellants' claim that the 404(b) evidence should have been excluded under Rule 403 lacks merit too. Under Federal Rule of Evidence 403, evidence must be excluded if its probative value "is substantially outweighed by the danger of unfair prejudice." *Wright,* 392 F.3d at 1276. "Rule 403 is an extraordinary remedy that must be used sparingly

---

[73] For example, in the *Swann* trial, the jury convicted Swann of bribery conspiracy, 6 substantive bribery counts, and 11 fraud counts, but acquitted him of one bribery count and 17 fraud counts. In the *McNair* trial, the jury convicted and acquitted different defendants on the same charges. In *McNair,* the jury convicted McNair on Counts 1-3 and 5-12 but acquitted him on Count 4. In both the *McNair* and *Swann* trials, the jury convicted Bobby Rast but acquitted Danny Rast on some of the same counts. In the *Barber* trial, the jury convicted PUGH but acquitted Roland Pugh on the same counts.

Moreover, in the *Swann* and *Wilson* trials, the district court charged the jury to consider each defendant "separately and individually" and reminded them that "each defendant is on trial only for the specific offenses or offense charged against such defendant in the indictment." In the *McNair* and *Barber* trials, the district court gave the same instruction with slight variations. Such jury instructions substantially mitigate the risk of spillover prejudice. *United States v. Cross,* 928 F.2d 1030, 1039 (11th Cir.1991).

because it results in the exclusion of concededly probative evidence." *US Infrastructure,* 576 F.3d at 1211. This Court in *US Infrastructure* rejected defendant USI's argument that certain 404(b) evidence of a non-party's bribes of McNair was inadmissible on Rule 403 undue prejudice grounds, stating "in cases where this Court has found other acts evidence inextricably intertwined with the crimes charged, the Court has refused to find that the evidence should nonetheless be excluded as unduly prejudicial. . . ." *Id.* "[T]he test under Rule 403 is whether the other acts evidence was 'dragged in by the heels' solely for prejudicial impact." *Id.* (quoting *United States v. Veltmann,* 6 F.3d 1483, 1500 (11th Cir.1993)). Because the other acts evidence was inextricably intertwined with the charged crimes, it was not excludable under Rule 403. In any event, its probative value substantially outweighed any undue prejudice.

Appellant McNair also points out that the government did not introduce any evidence that McNair knew about, condoned, arranged, or otherwise sanctioned any of the transactions constituting 404(b) bribe evidence against Swann. However, the Swann evidence was inextricably intertwined with the case against McNair because sewer rehabilitation decisions went through two or three stages of review in some situations, and thus the evidence showed the contractor-defendants were giving things of value to County employees at every level of the JCESD. For example, pay requests, contract modifications, and change orders were sometimes approved at the lower

levels by the JCESD's assistant director and engineers or by private engineers (like FWDE and Dougherty), and then, when necessary, sent to Swann as the JCESD's director – and then passed on to McNair for approval or submission to the County Commission with McNair's recommendation. The bribery of other County employees shown in the *McNair* and *Swann* trials was an integral part of the overall bribery scheme because it showed a common plan and motive of the contractor-defendants and completed the story. The government amply showed linkage between contractor-defendants' bribes to McNair and those to Swann and other County employees and vice versa. While the *USI* trial considered in *US Infrastructure* involved 404(b) testimonial evidence by electrical contractor Henson, which is not at issue in this appeal, this Court's analysis in *US Infrastructure* is apt here: "Henson's testimony was relevant to the chain of events surrounding the charged crimes, including context and setup. . . ." *US Infrastructure,* 576 F.3d at 1211.[74]

---

[74] The district court also did not err in admitting evidence of cash deposits to McNair's studio's construction account. *See United States v. Lattimore,* 902 F.2d 902, 903 (11th Cir.1990) (stating "[w]here the charged crime involves pecuniary gain and the Government presents other evidence of the defendant's guilt, evidence of the sudden acquisition of money by the defendant or his or her spouse is admissible, even if the Government does not trace the source of this new wealth."). This evidence was highly relevant to McNair's intent to accept goods and services bribes, especially since these cash deposits were to the McNair studio account and the goods and services bribes involved the same

(Continued on following page)

Finally, defendant-appellants point out that the two trials were severed and that "[s]everance under Rule 14 of the Federal Rules of Criminal Procedure is warranted only when a defendant demonstrates that a joint trial will result in 'specific and compelling prejudice' to his defense." Defendant-appellants argue that, because the district court severed the case, it "must have found that the jury would be unable to consider the evidence separately as it pertained to individual defendants."

This argument is unavailing. The district judge who severed these cases stated in a later telephone conference that, "perhaps some of [these cases] didn't even call for severance, but I leaned toward trying to avoid as much confusion as I could." In the same teleconference, the district court ruled that 404(b) evidence of other bribes was relevant and that jury instructions would prevent improper use of that evidence. ("I'm going to assume that if I tell them three or four times, they'll understand it.") At the beginning of the *McNair* trial, the court stated the cases were severed because it would be "cumbersome to try" them together, but "[t]hat doesn't necessarily mean that evidentiarily, they're not related." During the *McNair* trial, the district court again rejected defendant-appellants' argument that severance of the

---

McNair studio. The cash deposits also were listed as overt acts in Count 50. The defendants also have not shown reversible error as to their claim of untimely notice under 404(b).

counts meant that evidence related to the severed counts was irrelevant, stating:

> But that doesn't have anything to do with whether or not something is or is not relevant evidence to some other situation. That's like saying, they indicted them for a bank robbery thing but you can't show that they spent some of the cash over here in another deal or something.

Defendant-appellants cite no legal support for their argument that severance *per se* means other bribe evidence cannot be admitted. That the district court gave the defendants the benefit of trying McNair and the contractor-defendants in one trial, and then Swann and the contractor-defendants in a separate trial, does not mean all evidence about bribes to Swann could not be introduced in the *McNair* trial and vice versa.

IX. PROSECUTORIAL MISCONDUCT IN *MCNAIR* TRIAL

As to their convictions in the *McNair* trial, defendants PUGH and Roland Pugh argue that the prosecutor engaged in misconduct by (1) failing to correct Grady Pugh's false testimony, and (2) eliciting additional false testimony from Grady Pugh, thereby violating their due process rights.[75] Specifically, these

---

[75] PUGH's brief specifically adopts Roland Pugh's prosecutorial misconduct arguments, and Roland Pugh adopts all

(Continued on following page)

defendants argue that at trial Grady Pugh falsely denied having previously said he delivered cash bribes to McNair before a May 24, 2000 trip to buy carpet and falsely testified that he delivered the money after that May 24, 2000 trip.

These cash bribes were part of Counts 13 and 14. During the *McNair* trial, the time line of these events was at issue because it determined whether Counts 13 and 14 were barred by the statute of limitations.[76] The jury acquitted PUGH and Roland Pugh on Counts 13 and 14.[77] While the acquittal moots the statute of limitations issue, the time line of the cash bribes remains relevant only as to Count 1 (bribery conspiracy) and only because those cash bribes were alleged as overt acts in furtherance of the overall

---

relevant portions of PUGH's brief as to all issues. McNair, RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty adopt all arguments of all defendants as to all issues.

[76] The parties referenced the five-year limitations period for Counts 13 and 14 as from August 26, 2000 to August 26, 2005, the date the Second Superceding Indictment was submitted, which added Roland Pugh as a defendant. 18 U.S.C § 3282. Count 13 charged PUGH and Yessick with giving McNair $20,000 in cash. Count 14 charged PUGH and Roland Pugh with giving McNair at least $10,000 in cash in January 2001. However, if the cash bribes occurred *before* the May 24, 2000 carpet purchase in Georgia, the defendants argued Counts 13 and 14 would be barred by the five-year statute of limitations.

[77] While PUGH was convicted on multiple counts, Roland Pugh was convicted on only Count 1, the bribery conspiracy count. Other than some documentary evidence, Grady Pugh was the only witness testifying against Roland Pugh as to Count 1.

conspiracy to bribe McNair, for which PUGH and Roland Pugh were convicted. On appeal PUGH and Roland Pugh argue Grady Pugh's false testimony about the time line goes to his credibility and that if the jury knew he was lying, this could have affected the guilty verdict on Count 1.[78]

To establish prosecutorial misconduct for the use of false testimony, a defendant must show the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material.[79] *See United States v. Woodruff,* 296 F.3d 1041, 1043 n. 1 (11th Cir.2002); *United States v. Dickerson,* 248 F.3d 1036, 1041 (11th Cir.2001); *United States v. Alzate,* 47 F.3d 1103, 1110 (11th Cir.1995); *see also Napue v. Illinois,* 360 U.S. 264, 270-71, 79 S.Ct. 1173, 1177-78, 3 L.Ed.2d 1217 (1959). Perjury is defined as testimony "given with the willful intent to provide false testimony and not as a result of a mistake, confusion, or faulty memory." *United States v. Ellisor,* 522 F.3d 1255, 1277 n. 34 (11th Cir.2008).

---

[78] For the conspiracy charged in Count 1, it did not matter whether the cash deliveries were within the statute of limitations because there was ample evidence of other overt acts within the five-year statute of limitations period. *See United States v. Arias,* 431 F.3d 1327, 1340 (11th Cir.2005).

[79] We review a claim of prosecutorial misconduct *de novo* because it is a mixed question of law and fact. *United States v. Duran,* 596 F.3d 1283, 1299 (11th Cir.2010).

"When a government lawyer elicits false testimony that goes to a witness's credibility, we will consider it sufficiently material to warrant a new trial only when the estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." *United States v. Cole,* 755 F.2d 748, 763 (11th Cir.1985) (quotation marks and alteration omitted). In other words, "[t]he materiality element is satisfied if the false testimony could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Dickerson,* 248 F.3d at 1041 (quotation marks omitted). The false testimony is deemed material if there is a reasonable likelihood the false testimony could have affected the judgment of the jury. *Alzate,* 47 F.3d at 1110; *United States v. Barham,* 595 F.2d 231, 242 (5th Cir.1979).

In addition, a prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct. *United States v. Michael,* 17 F.3d 1383, 1385 (11th Cir.1994) ("We refuse to impute knowledge of falsity to the prosecutor where a key government witness'[s] testimony is in conflict with another's statement or testimony."); *Hays v. Alabama,* 85 F.3d 1492, 1499 (11th Cir.1996) (determining there was no due process violation where "there has been no showing that [the witness's] later, rather than earlier, testimony was false"); *United States v. Gibbs,* 662 F.2d 728, 730 (11th Cir.1981) ("Though knowing prosecutorial use of false evidence or perjured testimony violates due

process . . . it is not enough that the testimony . . . is inconsistent with prior statements."); *United States v. Brown,* 634 F.2d 819, 827 (5th Cir.1981) ("[D]ue process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements.").

A. Grady Pugh's Testimony About Cash Deliveries

The false testimony claim stems from notes the prosecutor made during Grady Pugh's two meetings with the prosecutor for plea negotiations on June 17 and 21, 2005. An FBI agent, counsel for Grady Pugh, and separate corporate counsel for PUGH were also present. The prosecutor's 2005 notes refer to Grady Pugh's two cash deliveries to McNair and his trip to Georgia where Grady purchased carpet for McNair on May 24, 2000 (for which Grady signed a PUGH company check bearing that date). The government disclosed the prosecutor's notes to defense counsel several months before trial.

At the *McNair* trial, Grady Pugh testified he delivered two envelopes of cash to McNair – the first at McNair's studio and the second at McNair's home at Christmas 2000 – both *after* he (Grady Pugh) took a flight to Georgia to purchase the carpet on May 24, 2000. In response, PUGH's counsel sought to impeach

Grady Pugh using the prosecutor's 2005 notes, attempting to show the notes reflected Grady Pugh gave both cash envelopes to McNair *before* Grady Pugh purchased the carpet on May 24, 2000. PUGH's counsel showed Grady Pugh the notes of the June 17, 2005 meeting indicating Grady delivered two cash envelopes to McNair:

> [GRADY PUGH]: It says in here that I delivered money to the studio and to his house, in these notes. . . .
>
> [PUGH'S COUNSEL]: Does it not say, the next time that Roland [Pugh] asked Grady [Pugh] to deliver an envelope of money, it was to McNair, was at McNair's studio?
>
> [GRADY PUGH]: It says that, yes, sir.
>
> [PUGH'S COUNSEL]: Okay. Despite that, that does not refresh your recollection?
>
> [GRADY PUGH]: Despite what it says, it's not true.[80]

---

[80] The June 17, 2005 meeting notes state:

- Roland Pugh asked Grady to deliver the money to McNair
- One Roland money [sic]
- Grady recalls being at Northport and having to take the envelope, which was a half inch thick, to McNair's house
- Grady and McNair sat down together in the house and chatted and then Grady left the envelope there between the two of them where McNair saw him put it

(Continued on following page)

PUGH's counsel then showed Grady Pugh the prosecutor's notes from the June 21, 2005 meeting and asked if he recalled that he told the prosecutor the two cash deliveries were *before* the carpet trip, but Grady replied he did not recall saying it in that order as follows:

> [PUGH'S COUNSEL]: I want to direct you to the portion of [the prosecutor's] notes which read, Grady [Pugh] delivered the second envelope of cash to McNair at the studio.
>
> . . . .
>
> [PUGH'S COUNSEL]: And after that, I want to direct your attention to the portion of [the prosecutor's] notes that say, Bill

---

- The next time that Roland asked Grady to deliver an envelope of money it was to McNair was at McNair Studio
- McNair was late and Grady had to wait for him
- When McNair showed up, Grady and McNair went to the van where they chatted and then Grady left the envelope there where McNair saw him put it down
- This delivery of money was after the shell of the studio had been erected
- Roland Pugh called Grady and told him that "McNair needs to look at some carpet" (or words to that effect) and that McNair needed RPC [PUGH] to make the deposit on the carpet
- Grady got the company plane to Birmingham and took McNair's daughter and Bill Bailey to LaGrange, Georgia to pick out the carpet

Bailey was there. And it continues, quote "best I recall" close quote, this was the first time Grady [Pugh] met Bill Bailey; and then it continues. Months later, Grady [Pugh] flew to Georgia for the carpet. . . . Does this refresh your memory that when you met with [the prosecutor and an FBI agent], that the sequence you provided was that the first delivery was to the house, the second delivery was to the studio, and they were both done months before you flew to Georgia for the carpet?

[GRADY PUGH]: I don't recall saying it in that order. The order that I remember it in, is the order that I told you Friday. I went to the studio first, then I went to the carpet, and then I went to Mr. McNair's house; and that's the way I remember it. That's the way it happened.[81]

---

[81] The June 21, 2005 meeting notes state:

- Grady thinks the RPC [PUGH] office was still in Northport when he delivered the first envelope to McNair
- Grady had to drive from Northport
- Grady thinks the second McNair envelope was when RPC's office was in the trailers in Avondale

. . . .

- Grady delivered the second envelope of cash to McNair at the studio
- He and McNair had already spoken inside the studio and then went to McNair's van

(Continued on following page)

PUGH's counsel suggested to the district court that he might call the prosecutor as a witness. The Court responded: "I think whatever you'd be calling him for doesn't amount to a hill of beans, and I'm not going to let it be done just to cause friction or embarrassment or whatever. So my strong inclination will be not to allow it." The defense did not call the prosecutor to testify.

In closing argument, PUGH's counsel argued Grady Pugh lied about the time line of these events, that his cash deliveries occurred outside the statute of limitations, and that the prosecutor's notes supported this argument. PUGH's counsel also recited portions of the prosecutor's notes.[82]

- Bill Bailey was there when Grady delivered the cash to McNair Studio but Grady does not appear to recall talking to Bailey about the money he was giving to McNair
- 'Best I recall' this was the first time Grady met Bill Bailey
- The weather was sunny but not cold
- Months later, Grady flew to Georgia for the carpet

[82] In closing argument, PUGH's counsel stated:

And then you heard on Monday, I finally got to show in Mr. Dillon's notes of that very interview. And he read to you from Mr. Dillon's own notes of the June 17th meetings. And he read to you, where they were talking chronologically in the June 17th, the first meeting, where he said that he delivered a note, an envelope to Mr. McNair's house, and the next time he was asked to deliver the envelope to the studio, and that then he was talking chronologically about going

(Continued on following page)

We conclude defendants PUGH and Roland Pugh have not met their burden to show Grady Pugh's testimony was actually false, much less that the government knew it was false. First, the notes themselves are in bullet form and contain no dates nor any explicit indication that they were necessarily intended to be read in chronological order. At trial Grady Pugh agreed he had a "clear recollection" of what he said during the meetings. At trial Grady Pugh reviewed the notes on defense counsel's instruction and stated that the notes were "not laid out in the order that things happened," that he did not "recall saying

---

to look for carpet. And it was even clearer when he got into the notes of the second interview where he said he delivered the second envelope of cash to McNair at the studio, the best he could recall. Remember I even got him – I think it was in quotes. Best I recall, this was the first time Grady met Bill Bailey. The next line, months later, Grady flew to Georgia for the carpet. Those are from Mr. Dillon's own notes of that meeting and that's what you heard the testimony was. Those do not establish any payment in July, whatsoever. They don't establish any payment that's been alleged in this case whatsoever. . . .

He gave even another story while on the stand. I was asking about the sequence and I was asking him whether these notes from his meeting refreshed his memory and he said I don't recall saying it in that order. The order that I remember it in is the order that I told you Friday. I went to the studio first, then I went to the carpet, and then I went to Mr. McNair's house, that's the way I remember it; and that's the way it happened.

it in that order," and, "[d]espite what it says, it's not true."[83]

Importantly, the documentary evidence is consistent with Grady Pugh's trial testimony that he delivered the money after the carpet purchase. The government introduced these checks: on May 24, 2000, Grady Pugh signed a $4,820.81 PUGH check made out to the carpet store; on July 18-19, 2000, Grady Pugh, Roland Pugh, and Yessick signed checks to cash totaling $9,000; and from December 15 to 22, 2000, Roland Pugh signed $38,750 in checks to Roland Pugh's daughters-in-law and to cash. Further, other witnesses corroborated Grady Pugh's trial testimony. For example, Bill Bailey testified he flew with Grady to pick out carpet and saw him "again" at the studio, where they "talked about airplanes for a second" before Bailey asked Grady "if he was here to help Chris McNair again," to which Grady answered yes.

Even assuming that Grady Pugh's denials of prior inconsistency were false or his time line of events was false, defendants, at a minimum, have not shown the prosecutor knew Grady Pugh's testimony was false, especially given how the documents and other witnesses corroborated his testimony.

---

[83] Nothing in the record indicates that after the 2005 meetings, Grady Pugh checked or adopted the prosecutor's notes.

In any event, defendants have shown no reversible error. The jury heard the relevant portions of the notes read into the record when PUGH's counsel was cross-examining Grady Pugh. During closing arguments, PUGH's counsel argued that the prosecutor's notes contradicted Grady Pugh's trial testimony and again recited relevant portions of the notes. Defense counsel thoroughly and exhaustively cross-examined Grady Pugh. Defense counsel pointed out other inconsistencies within Grady Pugh's trial testimony and in his grand jury testimony. The jury was also well aware Grady Pugh had made a plea deal and that the government's assessment of his cooperation would impact his eventual sentence. The jury had the information it needed to make an informed decision as to Grady Pugh's credibility. *See United States v. Calderon,* 127 F.3d 1314, 1325 (11th Cir.1997) ("[C]redibility determinations are the exclusive province of the jury.") (quotation marks omitted). "Therefore, because we find that the uncorrected, allegedly perjurious statements do not 'undermine confidence in the verdict,'" we reject defendants' prosecutorial misconduct claims. *Dickerson,* 248 F.3d at 1042 (citations omitted).[84]

---

[84] We note the defense did not call others present at the 2005 meetings as to what Grady Pugh said. And regardless of whether others at the 2005 meetings were taking notes, defense counsel still could have called them to elicit their personal recollection of what Grady Pugh said. However, we need not rely on this fact as it is abundantly clear counsel effectively cross-examined Grady Pugh.

B. Grady Pugh's Testimony About Note-Taking

Defendants PUGH and Roland Pugh also claim the prosecutor intentionally elicited from Grady Pugh the false testimony that "everyone was taking notes" at the 2005 meetings, even though the prosecutor knew he had instructed the FBI agent not to take notes.[85]

At trial the prosecutor asked Grady Pugh about the note-taking:

> Q: And when you signed that plea agreement, Mr. Pugh, had you already met with us on two occasions at the FBI office?
>
> A: Yes, sir.
>
> Q: And when you met with the FBI and myself, was your lawyer there?
>
> A: Yes, sir.
>
> Q: And was the company lawyer there?
>
> A: Yes, sir.
>
> Q: And was everybody taking notes?
>
> A: Yes, sir.

On cross-examination, the defense attempted to clarify this assertion, but Grady Pugh stated that it "looked to me like everybody was taking notes."

---

[85] The prosecutor acknowledged he told the FBI agent not to take notes during the 2005 meetings.

PUGH's corporate counsel asked Grady Pugh, "[a]nd do you remember that I objected and I indicated that I would take notes?"

The foregoing colloquy is ambiguous as to whether the prosecutor was referring to the lawyers in the room or also to the FBI agent. Grady Pugh reasonably could have taken "everybody" to mean the two lawyers about whom the defense had just asked. Moreover, while the record shows the FBI agent was not taking notes, defendants submitted no evidence that Grady Pugh's counsel or PUGH's counsel were *not* taking notes.[86] In sum, the defense has not met its burden to show the prosecutor believed or knew Grady Pugh's note-taking testimony was false. In any event, the defendants have not shown a reasonable likelihood that correction on this particular point, even if it did constitute "false testimony," could have changed the jury's evaluation of Grady Pugh's overall credibility. Therefore, it does not undermine confidence in the verdict. *See Dickerson,* 248 F.3d at 1041.

---

[86] The government stresses it would have been remarkable had Grady Pugh's counsel not taken notes during his own client's debriefings and plea negotiations in these two meetings. The prosecutor also points out that there is a reference in a December 2005 hearing before the magistrate judge that there was note-taking by Grady Pugh and PUGH's counsel at these meetings. We need not rely on that reference because it is enough to say defendants submitted no evidence that Grady Pugh or PUGH's counsel were not taking notes and have not carried their burden to show Grady Pugh's testimony was false.

X. STATUTE OF LIMITATIONS IN *WILSON* TRIAL

In the *Wilson* case, defendant PUGH claims the district court erred by denying its motion to dismiss Count 75 as time-barred under the five-year statute of limitations. *See* 18 U.S.C. § 3282.[87] Count 75 charged that from about August 1999 and continuing though [sic] June 2000, defendants PUGH a. d Wilson (as the JCESD's Chief Engineer) entered into a bribery conspiracy whereby Wilson corruptly solicited and accepted, and PUGH corruptly gave, a $4,500 payment (in the form of a bogus scholarship for Wilson's son) with the intent of influencing and rewarding Wilson for supporting PUGH's interests in connection with the JCESD sewer rehabilitation reconstruction program. Count 75 alleged that an object of the conspiracy was for Wilson to enrich himself and that PUGH and Wilson conspired to conceal PUGH's payment to Wilson by having it disguised as a bogus scholarship to UAB.

PUGH argues that Count 75 falls outside of the five-year limitations period because the latest overt act by a co-conspirator charged in the Indictment – Grady Pugh's sending a $4,500 check to UAB – was committed no later than August 24, 1999, which was

---

[87] "We review a district court's denial of a motion to dismiss the indictment for an abuse of discretion." *United States v. Clarke*, 312 F.3d 1343, 1345 n. 1 (11th Cir.2002). "We review the district court's interpretation and application of statutes of limitations *de novo*." *Id.*

outside the limitations period of February 7, 2000 to February 7, 2005.[88] The government responds that the Indictment charged Wilson's receipt of the benefit of UAB's four quarterly disbursements to his son as four separate overt acts, and the last two disbursements (March 17 and June 7, 2000) were made to the son within five years of PUGH's indictment on February 7, 2005. In reply, PUGH stresses that it is undisputed that UAB and Wilson's son were not members of the bribery conspiracy, and thus there was no overt act by a co-conspirator within the limitations period.

"In a conspiracy prosecution brought under § 371 the government in order to avoid the bar of the limitation period of § 3282 must show the existence of the conspiracy within the five years prior to the return of the indictment, and must allege and prove the commission of at least one overt act by one of the conspirators within that period in furtherance of the conspiratorial agreement." *United States v. Davis,* 533 F.2d 921, 926 (5th Cir.1976); *see Grunewald v. United States,* 353 U.S. 391, 396, 77 S.Ct. 963, 969-70, 1 L.Ed.2d 931 (1957) (addressing a three-year limitations period and concluding the government must prove that conspiracy was still in existence at beginning of limitations period and that at least one

---

[88] In this statute of limitations calculation, the parties use the February 7, 2005 date of the initial indictment. While the initial indictment itself bears the dates of February 3 and February 7, we use what the parties use.

overt act was performed after that date); *United States v. Dynalectric Co.*, 859 F.2d 1559, 1564 n. 6 (11th Cir.1988) (stating if an overt act is necessary for the commission of the conspiracy, then "the indictment must charge and the evidence at trial must show that an overt act in furtherance of the conspiracy was made within the limitations period").

By contrast, for "conspiracy statutes that do not require proof of an overt act, the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period." *United States v. Gonzalez*, 921 F.2d 1530, 1548 (11th Cir.1991) (citation and quotation marks omitted) (determining RICO conspiracy statute, unlike the general federal conspiracy statute, does not require an overt act). Unlike conspiracy statutes that do not require proof of an overt act,[89] the conspiracy statute PUGH was charged under, 18 U.S.C. § 371, does require proof of an overt act. *See* 18 U.S.C. § 371 (requiring that "one or more [co-conspirators] do any act to effect the object of the conspiracy").

As recounted above, Wilson solicited the bribe to help pay his son's college expenses in mid-1999, and Grady Pugh mailed a $4,500 check to UAB on August

---

[89] For example, neither a drug conspiracy under 21 U.S.C. § 846 nor a RICO conspiracy under 18 U.S.C. § 1962(d) requires proof of an overt act. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1121 (11th Cir.1990) (drug conspiracy); *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir.1983) (RICO conspiracy).

24, 1999. Because the tuition had already been paid by FWDE, Wilson did not actually receive the full benefit of the $4,500 check until UAB disbursed the final installment to Wilson's son in June 2000. The money disbursed to the son was a benefit to Wilson because he would otherwise have paid his son's expenses himself. Furthermore, where enrichment is an object of a conspiracy, the conspiracy continues until the conspirators receive the full economic benefits anticipated by their scheme, and a conspirator's *receipt* of a benefit can be considered an overt act. *See United States v. Anderson,* 326 F.3d 1319, 1328 (11th Cir.2003); *United States v. Girard,* 744 F.2d 1170, 1171-74 (5th Cir.1984). For example, in *Anderson,* the defendants conspired to obtain contracts by rigging bids in violation of antitrust laws and § 371. *Id.* at 1323. Although the bid-rigging contracts were beyond the limitations period, the final payment on one of the contracts came within it. *Id.* at 1328. The defendant Anderson contended that the final "payment was not an *overt act* in furtherance of the conspiracy but merely the *result* of the conspiracy." *Id.* This Court held that a *conspirator's acceptance of payment* on the illegally obtained contract constituted an overt act in furtherance of the conspiracy and brought the conspiracy within the statute of limitations. *Id.*

Although acceptance or receipt of a benefit can be an overt act, that overt act must be an act that is knowingly committed. *See United States v. Hogue,* 812 F.2d 1568, 1579 (11th Cir.1987) (stating as an "essential element [ ]" of a § 371 offense that "the

overt act was knowingly committed"); Eleventh Circuit Pattern Jury Instructions (Criminal Cases) at 137 (2003) ("An 'overt act' [under § 371] is any transaction or event . . . which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy."). The jury in the *Wilson* trial was correctly instructed on this point.

The problem for the government is the last two disbursements in 2000 were from a non-conspirator (UAB) to another non-conspirator (the son), and the government presented no evidence that defendant PUGH (through Grady Pugh) or Wilson *knew* that Wilson was receiving part of the benefit of the $4,500 in March or June 2000, rather than all at once in August 1999. There is also no evidence that Grady Pugh or Wilson gave any direction to UAB after August 24, 1999. At trial, Grady Pugh testified he was unaware of UAB's disbursement arrangements, and no evidence contradicted him on that point. Likewise, there was no evidence that Wilson was aware of the timing of the disbursements or that Wilson had any communications at all with UAB after the $4,500 check was sent on August 24, 1999. Accordingly, Wilson's receipt of the benefit of the March and June 2000 disbursements cannot be considered "overt acts" knowingly committed by him,

and the bribery conspiracy in Count 75 was beyond the statute of limitations.[90]

For these reasons, we reverse PUGH's conviction on Count 75.

XI. WHARTON'S RULE

Defendants argue they cannot be charged, convicted, or sentenced on both conspiracy to commit § 666 bribery and the substantive § 666 offenses, and thus their convictions violate Wharton's Rule. Roland Pugh additionally claims his sole conviction on Count 1 is barred by Wharton's Rule.

As the Supreme Court noted in *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), ordinarily a defendant can be convicted of both conspiracy to commit a crime and the substantive crime itself. *Id.* at 777, 95 S.Ct. at 1289-90. Historically, Wharton's Rule was only a narrow common law exception that provided that a defendant *cannot be punished* for conspiracy and a substantive offense if the substantive offense itself requires the participation of two persons. *See Iannelli,* 420 U.S. at

---

[90] The knowledge requirement was not at issue in *Anderson,* where the conspirator received the last payment or benefit directly. *Anderson,* 326 F.3d at 1328. While a third party can receive the payment on behalf of a conspirator (for example to disguise the payment), the conspirator must at least be aware of it. There was simply no evidence that Grady Pugh or Wilson was aware of how UAB applied and disbursed the money in 2000.

773, 95 S.Ct. at 1288. "The basic idea of Wharton's Rule is that where a [substantive] crime requires a plurality of agents for its commission, a charge of conspiracy cannot be used to impose a heavier penalty." *United States v. Collins,* 779 F.2d 1520, 1527-28 (11th Cir.1986).

Wharton's Rule reflects an era where conspiracy law was still developing, and it traditionally applied to offenses such as adultery, incest, bigamy, and dueling that were "characterized by the general congruence of the agreement and the completed substantive offense. . . ." *Iannelli,* 420 U.S. at 782, 95 S.Ct. at 1292. Wharton's Rule, however, is not grounded in the Constitution or in double jeopardy law and "has 'current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary.'" *Collins,* 779 F.2d at 1528 (quoting *Iannelli,* 420 U.S. at 782, 95 S.Ct. at 1292); *accord Curtis v. United States,* 546 F.2d 1188, 1190 (5th Cir.1977). "The former Fifth Circuit did not generally favor Wharton's Rule, and it expressed doubt that it could ever be applicable to a conspiracy to distribute narcotics." *Collins,* 779 F.2d at 1528 (citing *Curtis,* 546 F.2d at 1190); *see United States v. Previte,* 648 F.2d 73, 77 (1st Cir.1981) (stating "Wharton's Rule is, to some extent a relic of the discredited merger doctrine and should be interpreted narrowly" and explaining "the Rule does not forbid charging both a conspiracy and the substantive offense, even when it applies" as it "merely forbids sentencing on both counts").

In *Iannelli,* the Supreme Court held that Wharton's Rule did not apply to an illegal gambling statute, 18 U.S.C. § 1955. *Iannelli,* 420 U.S. at 791, 95 S.Ct. at 1296. The Supreme Court determined Congress intended that conspiracy to violate § 1955 and the substantive § 1955 offense should be separate crimes, stating, "[h]ad Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 by merging them into prosecutions under § 1955, we think it would have so indicated explicitly." *Id.* at 789, 95 S.Ct. at 1296.

We have already rejected, albeit without discussion, a Wharton's Rule challenge to a conviction for conspiracy to commit § 201 bribery. *United States v. Evans,* 344 F.3d 1131, 1133 & n. 2 (11th Cir.2003); *see United States v. Finazzo,* 704 F.2d 300, 306 (6th Cir.1983) (holding Wharton's Rule does not apply to a § 371 conspiracy to commit § 201 bribery, noting "the consequences of bribery not only affect the parties to the crime but have a negative effect on society at large," and pointing out "the agreement connected with the substantive offense of bribery . . . poses 'the distinct kinds of threats to society that the law of conspiracy seeks to avert'") (quoting *Iannelli,* 420 U.S. at 783, 95 S.Ct. at 1292).

Other circuits have concluded Wharton's Rule does not preclude a conviction for conspiracy to violate § 666(a)(1)(B). *See United States v. Bornman,* 559 F.3d 150, 156 (3d Cir.2009); *United States v. Hines,* 541 F.3d 833, 838 (8th Cir.2008), *cert. denied,* ___ U.S. ___, 129 S.Ct. 1385, 173 L.Ed.2d 638 (2009).

We now hold Wharton's Rule does not apply to § 666 crimes for two reasons, either one of which is sufficient alone. For starters, Congress has not expressed any intent that § 666 crimes and § 371 crimes for conspiracy to violate § 666 should merge. If Congress had intended to foreclose prosecuting § 371 conspiracy offenses in § 666 crimes, it could have said so or merged the offenses. Defendants point to nothing in the legislative history that suggests any intent to depart from the established general rule that a court can impose separate sentences for conspiracy to commit bribery and the substantive offense itself.

Second, the effect of the crime of § 666 bribery is not limited to the bribe-payor and recipient, as the crime involves public corruption, which harms society as a whole. "The purpose of § 666, to protect the integrity of federal funds, indicates that the immediate consequences of the behavior it proscribes rest on society at large," in this case, on the federal government and the people of Jefferson County. *Hines,* 541 F.3d at 838 (quotation marks omitted). Accordingly, we reject defendants' claims based on Wharton's Rule.[91]

---

[91] The defendant-appellants raise these additional conviction-related issues. Swann argues that (1) there was a material variance as to the conspiracy charged in the Indictment and any conspiracy proven, (2) the district court erred by failing to instruct the jury on multiple conspiracies, (3) the district court erred in not giving his proposed good faith instruction, (4) the district court should have severed his case alone for trial and

(Continued on following page)

XII. MCNAIR'S SENTENCE[92]

McNair was sentenced to concurrent 60-month sentences on one bribery conspiracy count (Count 1) and ten substantive bribery counts (Counts 2-3, 5-12) from the *McNair* trial and one bribery conspiracy count from the *USI* case (Count 32).[93] The district

---

apart from the contractor-defendants who bribed him, and (5) the district court committed cumulative error.

Roland Pugh and PUGH argue that (1) the district court erred in not giving a proposed instruction defining goodwill gifts and legal gratuities, (2) Count 15 as to PUGH should have been dismissed as "duplicitous," (3) there was a material variance as to their convictions for bribery conspiracy, (4) their involvement at most consisted of one-time buyer-seller transactions insufficient to sustain a conspiracy conviction, and (5) the district court committed cumulative error. As noted before, McNair, RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty adopt all arguments of all defendants as to all issues. In his cumulative error claims, Swann adopts all arguments of all defendants as to all issues.

After review and oral argument, we conclude there is no reversible error as to any of these listed issues or as to any other conviction-related issues raised by any defendants.

[92] Defendants McNair, Swann, and PUGH appeal their sentences. Defendants Roland Pugh, RAST, Bobby Rast, Danny Rast, FWDE, and Dougherty do not appeal their sentences.

[93] McNair pled guilty to Count 32 in the *USI* case. In his plea agreement, he waived the right to "challenge any sentence so imposed or the manner in which the sentence was determined." Thus, McNair waived his right to challenge his sentence as to Count 32. *See United States v. Johnson*, 541 F.3d 1064, 1067 (11th Cir.2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 2792, 174 L.Ed.2d 295 (2009) ("[A] waiver of the right to appeal a sentence necessarily includes a waiver of the right to appeal the restitution imposed."). Accordingly, we consider McNair's

(Continued on following page)

court ordered McNair to pay restitution of $851,927 to the Jefferson County Commission and a special assessment of $1,200 but no fine. This restitution represented $376,927 in bribes to McNair by Dawson and the Pugh, Rast, and Dougherty defendants, and $475,000 in bribes to McNair by the USI contractors.[94]

---

sentence on only Counts 1, 2-3, 5-12 in the *McNair* case. The district court did not tie or link the restitution to Count 32 so we reject the government's argument that McNair has waived his right to challenge the restitution.

[94] This $851,927 consisted of:

(1) $142,921 from PUGH ($11,709 for concrete work; three $20,000 payments; $4,820 carpet purchase; $17,200 in handrails; $5,000 retirement payment; and $44,192 check to George Word for McNair's Arkansas home);

(2) $84,566 from RAST ($52,990 in construction work by Mosley; $5,866 for security gate; $5,300 in carpet installation by Gilley; $5,500 in landscaping by Bailey & Sons; $1,775 in plumbing by Buchanan; $5,000 retirement payment; and $8,135 for Alaskan cruise);

(3) $133,040 from FWDE ($74,220 to Bailey for supervision; $5,000 retirement payment; $50,000 check to George Word for Arkansas home; and $3,820 for construction work on guard shack);

(4) $16,400 from Dawson for an audio visual system; and

(5) $475,000 from USI ($335,000 in cash and $140,000 paid on bogus invoices).

In the restitution amount, the district court included bribe amounts from some of the counts either that were not submitted to the jury (such as counts involving the Arkansas home and the three $5,000 payments after McNair's retirement) or on which McNair was acquitted (such as cash bribes).

(Continued on following page)

On appeal, McNair challenges only the restitution part of his sentence.[95]

A. Presentence Report

McNair's presentence investigation report ("PSI"): (1) assigned McNair a base offense level of 10, pursuant to U.S.S.G. § 2C1.1 (2001); (2) added 2 levels because McNair's conduct involved more than one bribe, pursuant to § 2C1.1(b)(1); and (3) added 24 levels because the net profit or benefit ($67,980,043)[96]

In our earlier recitation of the jury's verdict, we used the amount of the bribe listed in the Indictment. During trial or at sentencing, the government proved that some bribe amounts actually were higher. For example, the Indictment as to Swann alleged the amount paid to Stanger was $24,176, but the ultimate amount proved was $28,839. The Indictment as to McNair alleged the amount paid to Bailey was $27,434, but the ultimate amount proved was $74,220.

[95] This Court reviews *de novo* "the legality of an order of restitution," and reviews for an abuse of discretion the determination of the restitution "value" of lost or destroyed property. *United States v. Robertson*, 493 F.3d 1322, 1330 (11th Cir.2007). This Court reviews for clear error "factual findings underlying a restitution order." *Id.*

[96] McNair's PSI calculated this $67,980,043 as follows: (1) from July 2000 to October 2002, RAST received $82,668,465 through County contracts and earned an average profit of 17.5%, yielding $14,466,981 in profit; (2) from October 1999 to November 2002, FWDE received $19,647,100 in County contracts and earned an average profit of 12%, yielding $2,357,652 in profit; (3) from August 1999 to March 2002, PUGH received $109,015,665 in County contracts and earned an average profit of 43.61%, yielding $47,541,731 in profit; (4) from November 2000 to March 2001, Dawson Engineering received $2,108,283 in

(Continued on following page)

to the contractors in connection with their bribes of McNair was between $50 million and $100 million, pursuant to §§ 2B1.1(b)(1)(M) and 2C1.1(b)(2)(A).[97] A total offense level of 36 and a criminal history category of I yielded an advisory guidelines range of 188-235 months' imprisonment.

The PSI pointed out the total value of the bribes received by McNair was $889,962 and that restitution was mandatory, "pursuant to 18 U.S.C. § 3663A(a)(1)." The PSI reviewed McNair's financial records and determined his net worth was $497,163, calculated as follows:

Assets

Cash Assets	
*Checking Accounts	$ 379.00
Insurance, Cash Surrender Value	$ 10,521.00
Subtotal:	$ 10,900.00
Unencumbered Assets	
Motor Vehicles	$ 22,500.00
Subtotal:	$ 22,500.00

County contracts and earned an average profit of 12%, yielding $252,993 in profit; and (5) from February 1999 to February 2002, USI received $28,005,724 in County contracts and earned an average profit of 12%, yielding $3,360,686 in profit.

[97] The PSI for McNair used the November 1, 2001 edition of the United States Sentencing Commission Guidelines Manual (the "Sentencing Manual").

Equity in Other Assets	
*Residence	$ 96,000.00
McNair Investments (McNair Studio Bldg.)	$379,455.00
Subtotal:	$475,455.00
Total Assets	$508,855.00
	Unsecured Debts
*Credit Card Debt	$ 11,242.00
*Internal Revenue Service	$ 450.00
Total Unsecured Debts	$ 11,692.00
Net Worth	$497,163.00 [98]

Notably, McNair's net worth is largely due to his equity of $379,455 in McNair's studio building that was improved with the bribe money.[99]

---

[98] The PSI states: "Items marked with an asterisk (*) represent [McNair's] half of assets or obligations shared jointly with his spouse."

[99] The PSI's net worth calculation does not include McNair's partial ownership of certain Arkansas property, which the PSI described as follows:

> In addition to the above, the defendant indicated that he owns a one-twelfth share (along with his siblings) of his parents' home-place in Fordice, AR. The property includes 50 acres, the parents' original home, and a dwelling built in 2001. He indicated that the value of the property is approximately $300,000, so his share would be approximately $25,000. However, the property would be difficult to sell due to its joint ownership.

The PSI stated that McNair's monthly household income was $5,850, with monthly expenses of $4,109, resulting in net monthly cash flow of $1,741, calculated as follows:

Income	
Defendant's Social Security	$1,779.00
Defendant's Jefferson County Retirement	$1,794.00
Spouse's Social Security	$ 826.00
Spouse's Teachers Retirement	$1,451.00
Total Income:	$5,850.00
Necessary Living Expenses	
Home Mortgage	$1,990.00
Groceries, Supplies	$ 377.00
Utilities	$ 664.00
Telephone	$ 62.00
Transportation	$ 240.00
Auto Insurance	$ 89.00
Clothing	$ 53.00
Medical	$ 200.00
Credit Card Minimum Payments	$ 434.00
Total Expenses:	$4,109.00
Net Monthly Cash Flow	$1,741.00

McNair filed three sets of written objections to parts of the PSI, and the PSI was revised twice,

resolving some objections. McNair's main unresolved objections were his claims that the government failed to show: (1) that there was any victim owed restitution; and (2) that $889,962 was the amount of loss incurred by Jefferson County. In his written objections, however, McNair did not claim that he lacked the financial ability to pay restitution at all or in the amount of $889,962.[100]

B. Sentencing Hearing

At sentencing, McNair again claimed the government failed to identify any victim and failed to show any identifiable losses by Jefferson County or any connection between the bribes and the County's losses. McNair ultimately conceded he had received $851,927 in things of value but only for purposes of the guidelines imprisonment calculations.[101]

McNair maintained that no restitution should be awarded, because the government had not shown the County suffered a loss in that $851,927 amount or

---

[100] McNair filed no objection to ¶¶ 154-157 of the PSI that set forth all of this financial information.

[101] Contrary to the government's arguments, McNair's counsel repeatedly objected to the victims' identities and loss amounts for the basis of restitution. For example, McNair's counsel stated: "We have agreed, for guidelines calculations, concerning that amount, but we do not believe that that is an appropriate figure or that there is any appropriate figure for restitution in this case. And there is no basis legally to – for the Court to impose that kind of restitution order in this matter."

any amount for that matter. McNair's counsel argued that under "Title 18, 3663, the Mandatory Victims Restitution Act, that the Government is required to show losses connected to victims, and that the amount of bribes paid to Mr. McNair does not constitute losses to victims, and that there's been no showing of that. . . ." McNair contended "the amount of bribes paid to us is in no way connected to whatever losses these victims may or may not have sustained." McNair claimed there was no showing that $851,927 was the loss to the County. Citing "3663(B)(ii)" twice, McNair also argued the district court should not order restitution because the complexity and prolongation of the sentencing process in identifying victims and determining the amount of losses attributed to those victims outweighed the need to provide restitution. We pause to point out here that 18 U.S.C. § 3663 is the Victim & Witness Protection Act ("VWPA"), not the Mandatory Victims Restitution Act ("MVRA"), and the substance of McNair's argument comes from the VWPA.[102] And as discussed later, the district court's judgment effectively refers to the VWPA.

---

[102] Section 3663(a)(1)(B)(ii) is part of the VWPA and provides:

> (ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(Continued on following page)

During the sentencing hearing, McNair again did not claim he lacked the financial ability to pay restitution at all or in the amount of $889,962 referenced in the PSI. Ultimately, the district court found the Jefferson County Commission was the identifiable victim and found the amount of loss suffered was $851,927, reasoning:

> [C]ommon sense seems to me that, in any business, it doesn't intentionally go into business for the purpose of losing money; that the evidence in all of these cases clearly shows that there was a great deal of profit to be earned from these sewer contracts. And it seems to me, commonsensically, that if you pay a certain amount of money as bribe money, whether it's cash or for services performed, you're going to add that back into the contracts or the bills submitted to the Jefferson County Commission which pays the bills, in the first instance.
>
> It is how they do business. Stated more clearly, it is a cost of business, a direct cost of business that it paid and made up for, at some point, by the Jefferson County Commission directly, and then indirectly to the rate payers of Jefferson County.[103]

---

18 U.S.C. § 3663(a)(1)(B)(ii). Although citing "3663(B)(ii)," McNair's counsel argued the substance of § 3663(a)(1)(B)(ii).

[103] Judge C. Linwood Smith sentenced McNair after Judge Robert B. Propst conducted the *McNair* trial.

Recognizing the sewer construction contracts were awarded through a bidding process, the district court found that "the benefit to the bribe payors did not necessarily accrue in the awarding of those contracts in the first instance, but, rather, the benefit accrued during the performance phase of the work that they were engaged to perform through change orders, through agreements to additional payments due to change orders, and things of that nature." The district court also found, "[a]t some point, any direct cost of business is going to be added back by the bribe payors in the bills, the padded bills, that are submitted to the Jefferson County Commission," and "therefore, the Jefferson County Commission, in the first instance, which paid those bids, is an identifiable victim."

The district court reduced McNair's total offense level by 10 levels from 36 in the PSI to 26. Specifically, the district court reduced the 24-level enhancement in the PSI to a 14-level enhancement under §§ 2C1.1(b)(2)(A) and 2B1.1(b)(1)(H). For the § 2C1.1(b)(2)(A) calculation, the district court used the $851,927 in bribes the contractors made to McNair, not the $67,980,043 in net profits or benefits the contractors received.[104]

---

[104] The guidelines provide that for an offense where the benefit received or loss to the government is more than $400,000 but not more than $1 million, a defendant's offense level will increase 14 levels. U.S.S.G. §§ 2C1.1(b)(2)(A), 2B1.1(b)(1)(H) (2001). Section 2C1.1 governs the offense level for bribery of public officials but also uses, in part, the theft table in § 2B1.1.

After determining McNair's offense level was 26 and criminal history category was I, the district court determined that the advisory guidelines range was 63 to 70 months' imprisonment.[105]

The district court sentenced McNair to 60 months' imprisonment for each count, to run concurrently, followed by two years' supervised release, and ordered restitution of $851,927 to the Jefferson County Commission and a special assessment of $1,200. Although the advisory guidelines fine range was $20,000 to $135,960,086, the district court did not impose any fine. After noting its review of the PSI's financial information, the district court stated it imposed restitution but no fine, as follows:

> I reviewed the financial information provided in your presentence investigation. And in reliance upon that information, I find that you do not have the financial ability to pay even a minimum guideline fine. Further, the imposition of such a fine would unduly burden

---

[105] McNair objected to the PSI's failure to accord McNair a reduction for acceptance of responsibility. The district court overruled that objection. McNair does not appeal the district court's calculation of his advisory guidelines range as 63 to 70 months' imprisonment.

In addition, the government has not challenged the district court's use of the bribe amounts, as opposed to the net profits amounts, as the basis for the enhancement calculation under § 2C1.1(b)(2)(A), nor McNair's advisory guidelines range. So we assume for present purposes that the use of the bribe amounts and the guidelines range were proper.

> your wife, who is totally dependent upon you for not just physical and spiritual, but financial support. Therefore, no fine will be imposed.
>
> I do order, however, as I must order, that you pay to the United States a special assessment in the aggregate amount of $1,200. You also are ordered to pay restitution in the amount of $851,927. That is due to the Jefferson County Commission at the address shown in paragraph 172 of your presentence report.

At sentencing, the district court did not expressly state the statutory basis for its order of restitution. However, the district court's judgment states that, "pursuant to the Victim & Witness Restitution Act," the court finds the Jefferson County Commission is a victim of McNair's criminal conduct, has sustained a loss in the amount of $851,927, and orders restitution in the amount of $851,927.[106]

---

[106] We reject the government's argument that the district court imposed restitution under the MVRA. The PSI recommended the district court order restitution under "18 U.S.C. § 3663A(a)(1)," which is the MVRA. Although referring to the MVRA, McNair's attorney (in the sentencing hearing) cited sections in the VWPA and made arguments premised on the substance of the VWPA (§ 3663). And the district court's judgment references the "Victim & Witness Restitution Act." Although this reference used "Restitution" instead of Victim & Witness *Protection* Act, it more closely resembles the VWPA than the MVRA. The government never objected to that reference and

(Continued on following page)

C. Restitution for Victim's Loss

The VWPA, 18 U.S.C. § 3663, provides that:

> The court, when sentencing a defendant convicted of an offense under [Title 18] . . . other than an offense described in section 3663A(c),[107] may order . . . that the defendant make restitution to any victim of such offense, . . .
>
> (B)(i) The court, in determining whether to order restitution under this section, shall consider –
>
> > (I) the amount of the loss sustained by each victim as a result of the offense; and
> >
> > (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate. . . .

---

never moved to correct it. Thus, we conclude the district court imposed restitution under the VWPA.

[107] The VWPA, under which restitution is discretionary, excepts offenses in § 3663A(c), which is the MVRA, under which restitution is mandatory. We *sua sponte* note there is a potential issue of whether bribery is "an offense against property" covered by § 3663A(c) and whether the MVRA applies to bribery crimes. 18 U.S.C. § 3663A(c). Nothing herein should be read as implying the answer to that question. We review the VWPA only because that is the only thing the district court referenced in McNair's sentence.

> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663. "The government bears the burden of demonstrating the amount of the victim's loss by a preponderance of the evidence." *United States v. Futrell*, 209 F.3d 1286, 1290 (11th Cir.2000) (citing 18 U.S.C. § 3664(e), which states, "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence."). However, "[t]he burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents shall be on the defendant." 18 U.S.C. § 3664(e); *see United States v. Twitty*, 107 F.3d 1482, 1494 n. 14 (11th Cir.1997) (stating the burden rests on the defendant to demonstrate lack of financial resources by a preponderance of the evidence).

D. County's Losses

McNair argues that the government failed to prove any losses suffered by the County. We disagree. For starters, the evidence showed McNair received $851,927 in goods, services, labor, materials, and

money as a result of the bribery scheme. Further, during the same time period, the contractor-defendants received hundreds of millions of dollars in payments under their County contracts and made millions of dollars in profits.[108]

And the district court did not clearly err in finding that the contractors essentially recouped their bribe money by adding it back to their sewer and engineering contract bills as a cost of doing business with the County. *See United States v. DeVegter*, 439 F.3d 1299, 1303 (11th Cir.2006) ("Assuming the bribe achieves its intended result, the benefit would usually exceed the bribe."); *see also Futrell*, 209 F.3d at 1292 (concluding the district court did not abuse its discretion in ordering restitution under the MVRA based on "approximation" of loss resulting from defendants' fraud).

The district court's determination is consistent with Supreme Court precedent stating that when a public official acquires an ill-gotten benefit as a result of his office, the government suffers losses in that amount. *See United States v. Carter*, 217 U.S. 286, 305-06, 30 S.Ct. 515, 520, 54 L.Ed. 769 (1910).[109]

---

[108] *See supra* note 96.

[109] In *Carter*, the Supreme Court stated:

> It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, " . . . you cannot show that you have sustained any loss by my

(Continued on following page)

McNair next contends the district court erred by failing to consider his financial ability to pay restitution and by not making an explicit finding that he had the financial ability to pay restitution of $851,927. We can locate no place in this voluminous record where McNair claimed in the district court that he lacked the financial ability to pay restitution or the $889,962 amount of restitution recommended in the PSI and sought by the government. *See Jones*, 289 F.3d at 1265. Because McNair raises this issue for the first time on appeal, we review it only for plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.2005). We may not correct an error the appellant failed to raise in the district court unless there is: "'(1) error, (2) that is plain, and (3) that affects substantial rights.'" *Id.* (quoting *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 1785,

---

> conduct." Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

Carter, 217 U.S. at 305-06, 30 S.Ct. at 520.

152 L.Ed.2d 860 (2002)). If the preceding three conditions are met, we may exercise discretion to correct a forfeited error, but only if "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation marks omitted).

McNair has not shown plain error for several reasons. First, "[d]istrict courts are not obliged to make explicit factual findings of a defendant's ability to pay restitution if the record provides an adequate basis for review." *United States v. Dabbs,* 134 F.3d 1071, 1084 (11th Cir.1998) (quoting *Twitty,* 107 F.3d at 1493); *accord United States v. Fuentes,* 107 F.3d 1515, 1529 n. 27 (11th Cir.1997); *United States v. Remillong,* 55 F.3d 572, 574-78 (11th Cir.1995); *United States v. Hairston,* 888 F.2d 1349, 1353 (11th Cir.1989) (stating, "[i]f the record provides an adequate basis for . . . review, the court need not assign specific reasons for its decision to order full restitution. If the record is insufficient, reasons must be assigned.") (quotation marks omitted).[110] "'In order to warrant a reversal of the restitution order, the challenging party must show that the record is devoid of any evidence that the defendant is able to satisfy the restitution order.'" *Dabbs,* 134 F.3d at 1084 (quoting *United States v. Davis,* 117 F.3d 459, 463 (11th Cir.1997)). However, "we will not uphold the district

---

[110] Since 1989 this Court has agreed "with the courts that have declined to adopt a rigid rule requiring district courts to make findings of fact whenever they impose an order of restitution under the VWPA." *Hairston,* 888 F.2d at 1352.

court's exercise of discretion if the record is devoid of any evidence that the defendant is able to satisfy the restitution order." *Remillong*, 55 F.3d at 574.

Second, the record is not devoid of any evidence of McNair's ability to satisfy the restitution order. The PSI set forth McNair's finances in detail, the district court said it had reviewed that financial information, and McNair did not contest the facts as to his finances. There is no dispute that McNair has equity of $379,455 in his studio building, which was built in part using the bribe money. The studio value could reduce the restitution from $851,927 to $472,472.

In addition, McNair has a net cash flow of $1,741 per month, which is about the size of his monthly Jefferson County retirement check of $1,794. That retirement check alone permits McNair to pay $21,528 annually toward the restitution. Five years of $21,528 payments annually would equal over $100,000 in restitution. The unique problem in this case, however, is that McNair is now 84 years old.[111] Although the PSI states McNair "reports no current medical problems or prescription medications taken on a regular basis," it would take McNair 21.94 years at $21,528 per year to pay the remaining $472,472 left in restitution. Therefore, the record does not

---

[111] The PSI states McNair's date of birth is November 22, 1925.

necessarily show that McNair has the financial ability to pay the full $851,927 in restitution.

Nonetheless, under the fourth prong of plain error review, we conclude any error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings because (1) McNair, not the government, has the burden to prove lack of financial ability to pay the restitution in full; (2) the district court did not impose any fine but only restitution; (3) McNair does not dispute that he received $851,927 in goods, services, materials, labor, and other things of value; (4) no one, not even the district court if we remanded for further findings, knows how long McNair will live and continue to receive his monthly Jefferson County pension and thus be able to pay some restitution each month; and (5) the party owed this restitution is the same party currently paying McNair $1,749 per month, making it eminently fair to recapture these payments as restitution for as long as they are made. Given all of the unique circumstances in this case, McNair has not shown plain error in the district court's restitution order.

McNair also challenges the restitution order on the ground that *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), requires that the factual predicate for restitution be found by a jury beyond a reasonable doubt. McNair's *Booker* challenge is foreclosed by our precedent. *United States v. Williams*, 445 F.3d 1302, 1310 (11th Cir.2006) ("*Booker* does not apply to restitution orders."), *abrogated on other grounds by United States v. Lewis*, 492 F.3d

1219, 1222 (11th Cir.2007). We thus reject this argument.[112]

For the first time on appeal, McNair also claims the district court erred in ordering any restitution because co-defendant Roland Pugh was not ordered to pay restitution. We review this claim for plain error. *See United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.2005). Seven of McNair's co-defendants were ordered to pay restitution, to wit: PUGH ($239,652), Bobby Rast ($141,000), Danny Rast ($141,000), RAST ($141,000), Swann ($355,533), FWDE ($225,149), and Dougherty ($225,149). McNair has shown no plain error in this regard.[113]

---

[112] McNair objected to this statement in the PSI: "Theo Lawson, County Attorney for Jefferson County, AL, appeared at the sentencing in *U.S. v. Dougherty*, (05-61, 05-544) and indicated that the county requests restitution in each of these cases on the amount of the bribes." On appeal McNair claims the PSI's inclusion of this "testimony" violated his right to confrontation in the Sixth Amendment. We disagree. The district court never mentioned Lawson, let alone relied on his statement as the basis for restitution. In any event, this Court has held that "*Crawford* dealt with trial rights and we see no reason to extend *Crawford* to sentencing proceedings. The right to confrontation is not a sentencing right." *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir.2005).

[113] McNair received no fine while some co-defendants had significant fines, such as Roland Pugh ($250,000), PUGH ($19.4 million), Bobby Rast ($2.5 million), Danny Rast ($1 million), RAST ($1,702,500), Swann ($250,000), FWDE ($3,830,760), and Dougherty ($750,000).

For all these reasons, we affirm the restitution order as to McNair.

XIII. SWANN'S SENTENCE

Swann was sentenced to 102 months' imprisonment, followed by three years' supervised release, on one bribery conspiracy count (Count 51), six substantive bribery counts (Counts 52-54, 57, 58, and 60), and eleven counts of honest services mail fraud (Counts 90-100). The district court ordered Swann to pay restitution of $355,533 and a fine of $250,000. On appeal, Swann challenges the imprisonment and his fine but not the restitution.

A. Presentence Report

The PSI: (1) assigned Swann a base offense level of 10, pursuant to U.S.S.G. § 2C1.1 (2003); (2) added 2 levels because Swann's conduct involved more than one bribe, pursuant to § 2C1.1(b)(1); (3) added 22 levels because the net profit or benefit ($42,460,880)[114]

---

[114] Swann's PSI calculated this $42,460,880 in profit as follows: (1) from September 1998 to October 2002, RAST received $127,182,375 through County contracts and earned an average profit of 17.5%, yielding $22,256,740 in profit; (2) from September 1998 to November 2002, FWDE received $23,884,498 through County contracts and earned an average profit of 12%, yielding $2,866,139 in profit; and (3) PUGH's total profits for 2001 and 2002 amounted to $17,338,000.

We recognize that McNair's PSI showed total contractor profits of $67,980,043, but McNair's PSI included $3,360,686 in

(Continued on following page)

to the contractors in connection with their bribes of Swann was between $20 million and $50 million, pursuant to §§ 2C1.1(b)(2)(A) and 2B1.1(b)(1)(L); and (4) added 2 levels for obstruction of justice, pursuant to § 3C1.1.[115] A total offense level of 36 and a criminal history category of I yielded an advisory guidelines range of 188 to 235 months' imprisonment.

The PSI provided a detailed financial analysis of Swann's assets, including his cash, checking and savings accounts, savings bonds, deferred compensation account, debt, investments, income, and living expenses. The PSI reported Swann had $118,194 in assets, including $109,380 in deferred compensation, $95,000 in debt (taxes and attorneys' fees), and a net worth of $23,194. The PSI stated Swann's monthly income was $6,729 ($6,604 in Jefferson County pension and $125 salary for niece's trust fund). Thus, at the time of the PSI, Swann had an annual income of $80,748.

USI profits and $47,541,731 in PUGH profits (based on a longer time span of almost four years from August 1999 to March 2002). *See supra* note 96.

[115] The PSI for Swann used the November 1, 2003 edition of the Sentencing Manual.

The PSI reported that Swann's total monthly expenses were $6,971, calculated as follows:

Necessary Living Expenses	
Home Mortgage/Equity Line (645 Winwood)	$2,321.00
Home Mortgage/Equity Line (641 Winwood)	$1,201.00
Groceries/Supplies/Transportation (Includes all credit card purchases other than non-copay medical expenses.)	$1,435.00
Utilities	$ 452.00
Telephone	$ 118.00
Auto Insurance	$ 122.00
Life Insurance	$ 395.00
Home Maintenance Insurance	$ 36.00
Clothing	$ 20.00
Medical	$ 488.00
Printing/Copying/Postage	$ 60.00
Dry Cleaning	$ 10.00
Pest Control/Termite Bond	$ 48.00
OTC Medications/Personal Grooming	$ 122.00
Lawn Maintenance	$ 120.00
Internet Service	$ 23.00
Total Expenses:	**$6,971.00** [116]

[116] Swann also submitted other expenses as "necessary," which the PSI did not include in the above calculations as "necessary": meals out $75; entertainment $30; and newspaper $12.40.

The PSI noted (1) Swann's wife was retired from Bellsouth, (2) their newly remodeled home at 645 Winwood Drive was in her name, and (3) she owned their former home, at 641 Winwood Drive two doors down, jointly with her mother and paid that mortgage.[117] According to the PSI, Swann's wife had refused to provide any additional financial information for the PSI. Swann claimed he had no knowledge of the value of his wife's investments, nor of the income generated from her investments or retirement.

In calculating Swann's fine under 18 U.S.C. § 3571(d),[118] the PSI stated the "gross loss" amount was the $42,460,880 benefit the contractors received. Based on this information, the PSI determined the guidelines fine range was $20,000 to $84,921,760 (*i.e.,* double the gross loss amount pursuant to U.S.S.G. § 5E1.2). The PSI stated: "Based on his financial condition it appears that the defendant [Swann] could pay a fine within the guideline range or make a lump-sum payment toward restitution

---

[117] Swann filed no objections to ¶¶ 153-159 of the PSI that set forth all of this financial information.

[118] Section 3571(d) provides:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3571(d).

shortly after sentencing through use of liquid assets." The PSI noted that Swann's "future ability to make payments on an installment basis will be dependant [sic] on several factors including the sentence in this case, his family situation, and his ability to contain monthly expenses."

The PSI stated that restitution was mandatory under 18 U.S.C. § 3663A(a)(1) (the MVRA) and that the County had requested restitution.

Swann objected to the 22-level increase to his offense level under U.S.S.G. § 2C1.1(b)(2)(A), arguing his offense level should be based on the amount of bribes ($355,533) rather than the net profits or benefits ($42,460,880) the contractors received. Section 2C1.1(b)(2)(A) provides:

> If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

U.S.S.G. § 2C1.1(b)(2)(A) (2003).[119] Swann argued there was no evidence of a causal connection linking

---

[119] The guidelines provide that for an offense where the benefit received or loss to the government is more than $20 million but not more than $50 million, a defendant's offense

(Continued on following page)

any bribe to the award of any contract, and therefore, the 22-level adjustment under § 2C1.1(b)(2)(A) was improper. Even if a *quid pro quo* is not required for a § 666 conviction, Swann claimed evidence of a *quid pro quo* was necessary under § 2C1.1(b)(2)(A) to increase his offense level.

B. Sentencing Hearing

At sentencing, Swann objected to the PSI on the ground that co-defendants RAST, Bobby Rast, and Danny Rast's offense levels were based on the amount of bribes given, not the financial benefit or profit to them. Swann also objected to any obstruction of justice enhancement. The district court sustained Swann's objection to the obstruction enhancement.[120]

The district court, however, concluded the benefit, not bribe, amount should be used under

---

level will increase by 22 levels. U.S.S.G. §§ 2C1.1(b)(2)(A), 2B1.1(b)(1)(L).

[120] Because some of Swann's co-defendants were sentenced under an earlier guidelines edition and that edition would result in a lower guidelines range for him, Swann urged the court to use the earlier edition to avoid a sentencing disparity with his co-defendants. The district court overruled that objection.

On appeal Swann does not challenge the applicability of the 2003 guidelines edition to the calculations of his advisory guidelines range. Rather, as discussed later, Swann claims his sentence is substantively unreasonable because the use of different editions as to co-defendants caused disparities in his and his co-defendants' sentences that are unwarranted. We address that issue later.

§ 2C1.1(b)(2)(A) and found the evidence was "absolutely clear that there is at least 20 million dollars that was benefit" to the bribe-payor contractors. As support for the $20 million figure, the district court cited instances where Swann (1) decided not to invoke the performance bond against RAST, (2) allowed RAST to rebid the Valley Creek job for an additional $23.927 million, and (3) was involved in granting RAST a $2.677 million change order when RAST's boring machine became stuck. The district court found that a preponderance of the evidence established that the $20 million benefit to the bribe-payors "was a direct result of that influence of [RAST's] bribes." The court also pointed out that Swann granted PUGH's joint venture a 180-day extension just days after PUGH's Yessick hired a landscaper for Swann's property, saving PUGH's joint venture $180,000 in liquidated damages. At sentencing, the district court expressly found a direct connection between the bribes to Swann and the financial benefit to the bribe-payor contractors, stating:

> I think it is absolutely clear that there is at least 20 million dollars that was benefit, for instance, to [RAST], two change orders being 2.677 million of the digging out of the boring machine and pulling out a boring machine and rebid of that job, 23.927 million. The testimony as I recall it at trial and the testimony that was presented today, I conclude, based on the burden of proof that's required, not beyond a reasonable doubt but by a preponderance of the evidence, that that is due

> to be calculated at 2B1.1 as a gain of over 20 million dollars, that because of the decision by Mr. Swann that I believe was a result of the bribes and stuff that was provided him by RAST, I think that that was a direct result of that influence of those bribes. And I am not going to go through the others. Like for instance, the extensions, just one example is with regard to exhibit 36, the 180 extension that was granted to PUGH. A thousand dollars a day is what I recall the evidence to be that it would have been if they weren't granted that extension and that's $180,000. I am not even necessarily having to go to the aspect of whether or not because Mr. Swann was Mr. Wilson's supervisor the effect of the contracts or the approval of the committee because I find I am going to, for calculation of fine purposes, set that amount at 20 million and one dollars. More than 20 million, I am going to set it at 20 million and one dollars as clearly – in fact, actually I think I figured it at 26 million at the bottom end, but I am going to set it at 20 million and one dollars for the purpose of calculating the fine range, and I will ask him that you do that for me, and we'll need to recalculate the other.

The district court found that Swann's base offense level was 10, added 2 levels because Swann's offenses involved multiple bribes, and added 22 levels because the benefit to the bribe-payor contractors was between $20 million and $50 million, resulting in a total offense level of 34. *See* U.S.S.G. §§ 2C1.1(b)(2)(A), 2B1.1(b)(1).

This total offense level of 34 and a criminal history category of I yielded an advisory guidelines range of 151 to 188 months' imprisonment.

In considering the § 3553 factors, the district court found that Swann (1) was not credible in stating his wife was the one responsible and he did not know that these contractors were doing the work and what was going on, (2) had "not indicated any remorse whatsoever," and (3) refused to accept responsibility. The district court also considered that it was "bribery on a large scale of a public official" that had affected many people. The court noted "the need to reflect the seriousness of this offense and to promote respect for the law and to provide just punishment for this offense." The court also commented that, because Swann held a position of public trust, he was different than the contractor-defendants that were bribing him. The district court stated it had considered all of the § 3553 factors. Citing Swann's "history" and "character," the district court varied downward from the 151 to 188 months' range and imposed a sentence of 102 months' imprisonment, followed by 3 years' supervised release.[121]

Importantly, the district court also stated that, even if it had adopted Swann's view that the U.S.S.G.

---

[121] As to Counts 51 and 90 to 100, the district court imposed a sentence of 60 months' imprisonment, to run concurrently. As to Counts 52, 53, 54, 57, 58, and 60, the district court imposed a sentence of 102 months' imprisonment, to run concurrently. The sentences for all 18 counts thus run concurrently.

§ 2C1.1(b)(2)(A) calculation should be based on the bribe amount Swann received (instead of the net benefit to the contractors) and even if Swann's total offense level was 24 and his guidelines range was 51 to 63 months, it would nonetheless vary upward on Swann's sentence, explaining:

> [C]ounsel has urged me to utilize the guideline range that would result from considering the bribes of $355,533 in calculating your sentencing range and indicated that if I used that, it would result in a guideline offense level, criminal offense level of 24 when combined with a criminal history category of roman numeral one would result in imprisonment range of 51 to 63 months. *I am going to state for the record that if I used that, I would nonetheless vary upward* because I would believe that would not be sufficient to account for the other factors in [18 U.S.C. § 3553] that I am charged with the responsibility of weighing, including the nature and circumstances of this particular offense, as well as the need to reflect the seriousness of the offense, provide respect for law. *I would have varied upwards, in other words, on that sentence. So if the Eleventh Circuit has any question about that when they get this on appeal which I suppose they will, if they ask or wonder what I would have done had I went that way, that's what I would have done.* I believe that's appropriate and I have given that weight. I have actually considered that, and I started to just go ahead and do that. But I thought it

> appropriate in this instance because I think it is very clear that at least the 23 million dollars that I discussed earlier was a correct calculation.

(Emphasis added). Although the district court did not say the precise words – "I would impose the same 102 months sentence" – the record is patently clear that is what the district court meant.

As to restitution, Swann disputed that the amount of the bribes paid was $355,533, but conceded that, if restitution was owed, it should be based on the amount of bribes paid. Based on the evidence, the district court found the total bribe amount Swann received was $355,533. The district court rejected Swann's argument that restitution should be only the total $93,680 bribe amount referenced in the conviction counts (Counts 52-54, 57-58, 60, 90-100) that the jury found Swann received beyond a reasonable doubt. The district court ordered Swann to pay restitution of $355,533[122] to the "Jefferson County Commission."

---

[122] This $355,533 consisted of:

(1) $149,102 from PUGH ($7,422 for waterfall and koi pond, $1,000 in gift certificates to Alabama Book Smith, and $140,680 in landscaping by Guthrie);

(2) $55,885 from RAST ($4,441 for concrete work; $3,535 for flooring; $1,054 in brick work; $8,940 in plumbing; $9,733 for painting; $6,300 to Derek Houston for supervision; $18,867 in labor for miscellaneous

(Continued on following page)

As to the fine, Swann pointed out he "has no money," that his house was transferred to his wife's name before he became aware of the subpoenas in the investigation, and that he lost the respect of his community and thereby lost his ability to earn a living. Swann argued for a reduced fine but did not propose any specific fine amount.

After determining the advisory guidelines fine range was $17,500 to $40,000,002, the court imposed a $250,000 fine and a $1,800 special assessment. As to the $250,000 fine, the district court stated:

> You are ordered to pay a fine in the amount of $250,000. I don't know whether that's collectable or not. I don't think it is, but I think it's appropriate considering the circumstances.

C. Guidelines Range Calculations

On appeal Swann claims the district court improperly calculated his guidelines range because "[t]he court utilized a 'net benefit' approach instead of the amount of the alleged bribes in calculating the base offense level." This is a challenge to the

---

employees; and $3,015 for Swann's trip to England and Scotland); and

(3) $150,929 from FWDE ($28,839 to Stanger for supervision; $94,090 to Hendon for supervision; and $28,000 to Dudley Davis for framing). The sentencing court and its judgment use $355,533, and we do too. But these amounts total $355,933.

procedural reasonableness of Swann's 102 months' imprisonment sentence.[123]

As noted earlier, the bribery offense level is calculated using *the greater* of the value of the bribe payment or the benefit received in return. *See* U.S.S.G. § 2C1.1(b)(2)(A). "The value of 'the benefit received or to be received' means the net value of such benefit." § 2C1.1 cmt. n.2.[124] "The net value of the improper benefit need only be estimated, and the bribe amount should be used only when the net value

---

[123] In reviewing the reasonableness of a sentence, we apply an abuse-of-discretion standard using a two-step process. *United States v. Pugh*, 515 F.3d 1179, 1189-90 (11th Cir.2008) (relying on *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007)). First, we look at whether the district court committed any significant procedural error, such as miscalculating the advisory guidelines range, treating the guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to explain adequately the sentence. *Pugh*, 515 F.3d at 1190. Then we look at whether the sentence is substantively reasonable under the totality of the circumstances. *Id.*

[124] The Commentary to § 2C1.1 gives the following examples of net value: "(1) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000." U.S.S.G. § 2C1.1 cmt. n.2.

The Commentary to § 2C1.1 also provides: "[F]or deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher." *Id.* cmt. Background.

cannot be estimated." *DeVegter,* 439 F.3d at 1303. The net value "need only be a reasonable estimate given the information available to the government." *United States v. Cabrera,* 172 F.3d 1287, 1292 (11th Cir.1999).[125]

On appeal Swann does not claim that the bribe amount ($355,533) he received was greater than the net benefit amount (over $20 million) the contractor-defendants received.[126] Rather, Swann argues that, to use the net benefit approach, the government first must show a connection (*i.e.*, a *quid pro quo*) between a particular bribe and a particular contract or action by a public official. Swann claims the government's

---

[125] In *United States v. DeVegter,* 439 F.3d at 1304, this Court adopted the Fifth Circuit's approach to calculating net value under § 2C1.1 as set forth in *United States v. Landers,* 68 F.3d 882 (5th Cir.1995). The Fifth Circuit in *Landers* concluded that the profit on a contract, not the gross revenue or value, is to be used to determine net value. We stated in *DeVegter,* "[w]e agree with the Fifth Circuit's approach [in *Landers*] which subtracts direct costs, but not indirect costs, from profits to determine the net improper benefit." *DeVegter,* 439 F.3d at 1304.

[126] Swann's appeal brief refers to the $20 million as the "net benefit" and does not argue that the district court erred by using $20 million in its calculation of net benefit. Although the district court's finding that the benefit was $20 million to the contractor-defendants appears to be based on gross revenue received by the contractor-defendants and not their net profit, other portions of the trial record amply support total profits in excess of $20 million to the contractor-defendants RAST, PUGH, and FWDE, and thus a net benefit in excess of $20 million. This may be why no remand was requested on this issue.

evidence failed to show the requisite causal connection.

In this regard, Swann first argues there is no connection between the bribes he received and the contractors' revenue because he had no authority to award the sewer or engineering contracts. Alternatively, Swann claims, "there was no tie or connection of any kind between any alleged bribe and any contract awarded even if Appellant Swann could have influenced the award of the contract." Therefore, Swann says, "the proper loss amount to be utilized under § 2C1.1 was the amount of the alleged bribes paid to Appellant Swann and the court erred in failing to utilize said amount." Swann points out that had the $355,533 bribe amount been used (as opposed to the $20 million benefit amount), the district court would have added only 12 levels (not 22) under § 2C1.1, resulting in a total adjusted offense level of 24 (not 34).

This Court has not addressed what type of connection under § 2C1.1(b)(2)(A) the government must establish between the bribe given and the benefit received. Section 2C1.1(b)(2)(A) does speak in terms of "the value of . . . the benefit received or to be received in return for the payment. . . ." U.S.S.G. § 2C1.1(b)(2)(A). Other circuits have held that the threshold for establishing a causal connection under § 2C1.1(b)(2)(A) is low. *See United States v. Sapoznik*, 161 F.3d 1117, 1119 (7th Cir.1998) (concluding that "[t]o show that the bribes benefitted the people paying them [the bar owners/illegal gambling], . . . it is

enough for the government to show that the bribes facilitated the gambling operations"); *United States v. Kinter,* 235 F.3d 192, 198 (4th Cir.2000) (stating "[t]he threshold for the causation inquiry for § 2C1.1 calculations is relatively low"). In *Sapoznik,* the Seventh Circuit explained that the question of causation between the bribe and the benefit is different from the question of quantification of the actual benefit received, concluding the government had established a causal connection between the bribe and the benefit even though it had not shown the precise amount of the benefit to the bribe-payor. *Sapoznik,* 161 F.3d at 1119. And the bribes need only contribute or facilitate the business activity involved. *Id.*

Here, given the wealth of evidence in the record, we readily conclude the district court did not clearly err in finding that the benefits the contractors received (such as the RAST revenue from the $2.6 million change order, the RAST job rebid for an additional $23,837,350, and the PUGH time extension on the Vestavia Trunk Sewer Replacement project) were a result of the corrupt bribes to Swann. This amply satisfies any causal connection requirement in § 2C1.1(b)(2)(A).[127] Accordingly, we find no

---

[127] We review the district court's findings of fact in sentencing for clear error. *DeVegter,* 439 F.3d at 1303. We do not find clear error unless "'we are left with a definite and firm conviction that a mistake has been committed. . . . [T]he clear error standard is purposefully deferential to the district court, . . . [but r]eview for clear error does not mean no review.'" *Id.* (quoting *United States v. Crawford,* 407 F.3d 1174, 1177 (11th Cir.2005)).

(Continued on following page)

reversible error in the district court's calculations adding 22 levels under § 2C1.1(b)(2)(A) to Swann's offense level.

The district court alternatively stated that even if it used the bribe amount approach and not the net benefit approach, it would vary upward from the lower range (51 to 63 months) urged by Swann based on "other factors in 18 USC Section 3553 that I am charged with the responsibility of weighing." Therefore, we also conclude any error in the guidelines calculations as to Swann was harmless. *See United States v. Barner,* 572 F.3d 1239, 1248 (11th Cir.2009) ("Where a district judge clearly states that he would impose the same sentence, even if he erred in calculating the guidelines, then any error in the calculation is harmless."); *United States v. Dean,* 517 F.3d 1224, 1232 (11th Cir.2008), *aff'd, Dean v. United States,* ___ U.S. ___, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009); *United States v. Keene,* 470 F.3d 1347, 1348-49 (11th Cir.2006).

D. Substantive Reasonableness

Swann also argues his 102-month sentence was substantively unreasonable because the district court impermissibly considered that (1) Swann showed no remorse, and (2) because he was a public official, Swann was more culpable than the contractors and,

---

We review questions of law arising under the federal Sentencing Guidelines *de novo. Id.*

without his conduct, the bribe-payors could not have committed the crime.[128]

This Court considers the substantive reasonableness of the sentence imposed by inquiring whether the sentence is supported by the 18 U.S.C. § 3553(a) factors. *Gall v. United States,* 552 U.S. 38, 56, 128 S.Ct. 586, 600, 169 L.Ed.2d 445 (2007).[129]

The district court need not discuss each of the § 3553(a) factors. *United States v. Talley,* 431 F.3d 784, 786 (11th Cir.2005) ("[N]othing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the section 3553(a) factors or to discuss each of the section 3553(a) factors.") (quotation marks omitted). The

---

[128] Swann claims these were improper factors (1) for not varying even lower than 102 months from the 151 to 188 months guidelines range and alternatively (2) for varying upward to 102 months from the 51 to 63 months guidelines range.

[129] The § 3553(a) factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a). We review *de novo* whether the district court considered an impermissible factor. *United States v. Velasquez Velasquez,* 524 F.3d 1248, 1252 (11th Cir.2008).

district court's acknowledgment that it considered the defendant's arguments and the factors in § 3553(a) is sufficient. *Id.*

The district court's consideration of Swann's lack of remorse was not improper. A district court is permitted to consider lack of remorse in its § 3553(a) analysis as to several factors, such as the characteristics of a defendant, the need to promote respect for the law, and the need to protect society. *See United States v. Kapordelis,* 569 F.3d 1291, 1318 (11th Cir.2009) (stating "district court did not abuse its discretion by considering . . . [defendant's] lack of remorse" and affirming where district court found "upward variance was necessary to protect society because it was unlikely that [the defendant] would be rehabilitated given his attitude and lack of remorse"), *cert. denied,* ___ U.S. ___, 130 S.Ct. 1315, ___ L.Ed.2d ___ (2010); *United States v. Cruzado-Laureano,* 527 F.3d 231, 236-37 (1st Cir.2008) (upholding consideration of lack of remorse as a permissible factor under § 3553(a)(1) as to the characteristics of a defendant, under § 3553(a)(2)(A) to promote respect for the law, and under § 3553(a)(2)(C) to protect the public from future crimes of the defendant). The district court also did not err in considering Swann was a public official, another characteristic of the defendant. *See* 18 U.S.C. § 3553(a)(1).

Swann further argues there was an unwarranted disparity between his 102-month sentence and those of his co-defendants Bobby Rast (51 months), Danny Rast (41 months), and Dougherty (51 months). Swann

claims Bobby and Danny Rast received lower sentences because the district court sentenced them using the bribe amount (not the net benefit amount) in calculating their guidelines ranges under § 2C1.1.[130] Swann argues that in using the net benefit in his case, the district court created sentencing disparity with similarly situated co-defendants because it had utilized different methods to calculate the guidelines range for various co-defendants. This ignores a number of factors that differentiate Swann from these particular co-defendants: (1) Swann was a public official and the private contractors were not, (2) Swann took bribes not just from the Rast defendants but also from the Pugh and Dougherty defendants, (3) the district court found Swann not credible in stating he did not understand the home remodeling work was intended to influence him, and (4) Swann showed a lack of remorse. Simply put, Swann has not proved he and these particular co-defendants are similarly situated.

As to FWDE and Dougherty, Swann also argues they received lower sentences because the district court applied an earlier edition of the sentencing guidelines. As to FWDE, Swann is incorrect because the PSI and the district court applied the 2003 guidelines to calculate FWDE's sentence. As to Dougherty,

---

[130] Judge L. Scott Coogler conducted the *Swann* and *Wilson* trials and sentenced Swann on March 30, 2007, the Rast defendants on March 29, 2007, and the Dougherty defendants on March 28, 2007. Different judges sentenced McNair and PUGH.

the 2000 guidelines were used. Under the 2000 guidelines, a $20 million net benefit resulted in a 16-level increase, rather than the 22-level increase in the 2003 version. *Compare* U.S.S.G. § 2F1.1(b)(1)(Q), (R) (2000) *with* § 2B1.1(b)(1)(L), (M) (2003).[131] That a district court may have used the wrong version of the guidelines in a co-defendant's separate sentencing (to the benefit of a defendant) does not make another defendant's sentence under the correct version unreasonable in any way. In addition, the Dougherty defendants' profits were much lower than the Pugh and Rast defendants, who also gave bribes to Swann. Also, Swann ignores the fact that the district court granted a downward variance to 102 months from his advisory guidelines range of 151-188 months. Swann has shown no reversible error in his 102-month sentence based on disparity with his co-defendants.

E. Swann's Fine

The district court ordered that Swann pay a fine of $250,000, based on a fine guidelines range of $20,000 to approximately $84 million. *See* U.S.S.G. § 5E1.2. Swann argues that the district court erred in not considering any of the fine guidelines factors, including Swann's ability to pay.

---

[131] With a 16-level increase, Swann's total offense level would be 28, which, with a criminal history category of I, would yield an advisory guidelines range of 78 to 97 months under the 2000 guidelines. For Dougherty, the PSI used the 2000 edition, and, apparently, there was no objection by the government.

The sentencing guidelines require courts to "impose a fine in all cases, except where the defendant establishes he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). The defendant has the burden of proving inability to pay a fine. *United States v. McGuinness,* 451 F.3d 1302, 1307 (11th Cir.2006).[132]

After determining a fine is appropriate, the district court shall consider these factors in fixing the amount of the fine:

> (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;
>
> (2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;
>
> (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;
>
> (4) any restitution or reparation that the defendant has made or is obligated to make;

---

[132] This Court reviews a district court's decision that a defendant can pay a fine for clear error. *United States v. Gonzalez,* 541 F.3d 1250, 1255 (11th Cir.2008).

> (5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;
>
> (6) whether the defendant previously has been fined for a similar offense;
>
> (7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and
>
> (8) any other pertinent equitable considerations.

U.S.S.G. § 5E1.2(d).

"While some circuits require that the district court make specific findings, we have adopted the less rigid approach, and do not require the sentencing court to make specific findings of fact with respect to the Sentencing Guideline factors as long as the record reflects the district court's consideration of the pertinent factors prior to imposing the fine." *United States v. Hernandez,* 160 F.3d 661, 665-66 (11th Cir.1998) (citations and quotation marks omitted); *see United States v. Lombardo,* 35 F.3d 526, 530 (11th Cir.1994) (holding that where the record contains sufficient information with respect to the factors to permit us to find that the district court did not clearly err in imposing or in setting the amount of the fine, we will not reverse merely because the district court failed to make specific findings on each of the factors). "Explicit findings on these factors are not required. . . ." *United States v. Khawaja,* 118 F.3d 1454, 1459 (11th

Cir.1997). We have applied this rule to uphold a fine where the district court did not make explicit findings of fact as to the defendant's ability to pay. *United States v. Long,* 122 F.3d 1360, 1367 (11th Cir.1997). However, "[i]f the record does not reflect the district court's reasoned basis for imposing a fine, we must remand the case so that the necessary factual findings can be made." *United States v. Gonzalez,* 541 F.3d 1250, 1256 (11th Cir.2008) (quotation marks omitted).

Swann claims the PSI said Swann could pay a fine within the guidelines range *or* make a lump-sum restitution but not both. That is not correct. We quoted the PSI earlier as it (1) says that Swann could pay a fine or make a lump-sum payment toward restitution shortly after sentencing with liquid assets, and then (2) states it does not determine Swann's future ability to pay a fine or further restitution on an installment basis.

Furthermore, the district court adopted the factual findings in the PSI, which included numerous findings relevant to Swann's current income and future earning capacity. The PSI set forth Swann's net worth, educational background, work history, and monthly income of $6,729, yielding $80,748 annually. Swann holds two bachelors degrees, one in civil engineering and one in textile management, and a masters degree in sanitary engineering. Swann has retired from Jefferson County but submitted no evidence to show he had tried and failed to gain employment. Swann already has an annual retirement

income of $80,748 even without social security or future wages from working.[133]

Although Swann makes two mortgage payments on the two Winwood Drive residences and pays over $658 in monthly home utility, lawn, pest control, and maintenance expenses, the homes are in his wife's name and she lives there too. The record shows Swann can pay at least some fine. The record also shows Swann's counsel argued for a reduced fine and the district court considered the pertinent factors. As the district court reviewed the PSI before imposing the fine and heard argument of counsel about the fine, "we infer without hesitation that the district court considered the pertinent factors prior to imposing the fine." *Khawaja,* 118 F.3d at 1459.

Although Swann has shown no clear error in the district court's imposition of some fine, the record is not sufficient to permit us to say there is no error in the amount of the fine. As to the $250,000 amount, the district court remarked: "I don't know whether that's collectable or not. I don't think it is. . . ." We cannot glean from the record the basis for this statement or how the court determined that the fine should be $250,000 as opposed to $150,000 or $750,000, especially given the fine guidelines range goes up to $84 million. Thus, we vacate and remand as to the amount of the fine. *See Khawaja,* 118 F.3d at

---

[133] The PSI, dated February 5, 2007, did not show Swann drawing any social security. In 2010, Swann is now 64.

1459-60 (requiring remand where record does not reflect court's reasoned basis for amount of $175,000 fine).

XIV. PUGH'S SENTENCE

PUGH was sentenced to 60 months' probation on four bribery conspiracy counts (Counts 1 involving McNair, 51 involving Swann, 75 involving Wilson, and 78 involving Barber), nine substantive bribery counts (Counts 15, 61-63, 71, 83-86), and eleven counts of honest services mail fraud (Counts 90-100). The district court ordered PUGH to pay a $19.4 million fine, a special assessment of $9,600, and $239,652 in restitution to the Jefferson County Commission. On appeal, PUGH challenges only the fine.

A. Presentence Report

The PSI stated that PUGH performed nearly $200 million worth of construction work for sewer projects for Jefferson County between 1997 and 2003 and that a majority of this work was for JCESD-related projects. The PSI listed bribes given by PUGH to McNair, Swann, Chandler, Barber, and Wilson, totaling $395,514.[134] The PSI stated that PUGH had

---

[134] This $395,514 in restitution consists of PUGH's payments of:

(1) $192,000 to McNair ($175,000 for construction, remodeling, and cash for his studio and $17,200 installation of hand railings for his studio);

(Continued on following page)

this net income: $19.09 million in 2001, $15.32 million in 2002, $9.10 million in 2003, $2.94 million in 2004, and $3.67 million in 2005. PUGH's federal tax returns reported net income of $17.89 million in 2001, $14.95 million in 2002, $8.10 million in 2003, $3 million in 2004, and $3.97 million in 2005.

According to the PSI, PUGH received more than $109 million in JCESD contracts related to the bribery conspiracy from August 1999 to June 2003. This $109 million reflected only PUGH's portion of its joint venture work for Jefferson County. The PSI determined that from 1999 to 2002 PUGH earned an average profit of 43.61% and that PUGH's profit from County contracts was $47.92 million.[135]

---

(2) $149,102 to Swann ($140,680 for Guthrie Landscaping, $7,422 for installation of waterfall and pond, and $1,000 in gift certificates to Alabama Book Smith);

(3) $610 to Chandler for condominium rental at Pelican Beach Condominiums;

(4) $49,102 to Barber ($47,927 for McCalla, Alabama land, $148 for casino trip to Vicksburg, Mississippi, $546 resort trip to Biloxi, Mississippi, and $481 trip to Gulf Shores, Alabama); and

(5) $4,500 to Wilson (UAB scholarship).

[135] PUGH later filed for Chapter 11 bankruptcy. At the time PUGH's PSI was prepared, the bankruptcy case was pending. In April 2008, the bankruptcy court confirmed PUGH's proposed plan of liquidation. *See In re Roland Pugh Constr., Inc.*, No. Bk-06-71769-CMS-11, 2007 WL 509225 (Bankr.N.D.Ala. Feb. 12, 2007). The bankruptcy court ordered PUGH to establish a trust account in the amount of $19,409,600, which would be used to

(Continued on following page)

The PSI: (1) assigned PUGH a base offense level of 10, pursuant to U.S.S.G. § 2C1.1(a) (2003); (2) added 2 levels because the offense involved more than one bribe, pursuant to § 2C1.1(b)(1); and (3) added 22 levels because the net profit to PUGH was between $20 million and $50 million, pursuant to §§ 2C1.1(b)(2)(A) and 2B1.1(b)(1)(L),[136] yielding a total offense level of 34.[137] Under the § 8C2.4(d) table, this total offense level of 34 required a *base fine* amount of $28.5 million.

However, the PSI determined PUGH's pecuniary gain under § 8C2.4(a)(2) was its $47.92 million profit from the County contracts. Under § 8C2.4(a), the *base fine* amount became $47.92 million, because PUGH's $47.92 million pecuniary gain was greater than the $28.5 million amount from the § 8C2.4(d) fine table and greater than the pecuniary loss of $319,425 suffered by the victim County.

The PSI determined PUGH's culpability score was 7 under § 8C2.5, because (1) PUGH had 50 or more employees and (2) individuals with substantial

---

pay the federal criminal fine assessed in the present case. *In re Roland Pugh Constr., Inc.*, No. Bk-06-71769-CMS-11 (Bankr.N.D.Ala. Apr. 21, 2008).

[136] The PSI listed the table section as "§ 2B1.1(b)(1)(M)" but applied the enhancement listed in § 2B1.1(b)(1)(L) of that table, which provides a 22-level enhancement for amounts between $20 million and $50 million.

[137] The PSI for PUGH used the November 1, 2003 edition of the Sentencing Manual.

authority (Board Chairman Roland Pugh, CEO Grady Pugh, and President Yessick) participated in the offenses. This culpability score of 7 resulted in a minimum fine multiplier of 1.4 and a maximum multiplier of 2.8, under § 8C2.6. Based on these multipliers and the base fine of approximately $47.92 million, the PSI calculated the guidelines fine range to be $67,089,446.48 to $134,178,892.96.

The statutory maximum fine was $95,842,066, pursuant to 18 U.S.C. § 3571(b), (d) (*i.e.*, double the pecuniary gain of $47.92 million). Thus, the PSI concluded PUGH's advisory guidelines fine range was $67,089,446 to $95,842,066.

The PSI stated PUGH appeared unable to pay a fine within that $67 million to $95 million guidelines range and recommended the district court reduce the fine if it determined PUGH was unable to pay the minimum fine amount. The PSI noted that, under § 8C3.4, the guidelines fine could be offset by 67.75%, because (1) PUGH was a closely held organization, (2) three of PUGH's owners (Roland Pugh, Yessick, and Grady Pugh) whose total interests amounted to 67.75% had already been fined for the same offense conduct, and (3) one owner (Andy Pugh) had a 32.25% interest and was not convicted in the bribery scheme.

PUGH objected to the PSI's calculation of profits or pecuniary gain. PUGH argued there was no evidence that PUGH obtained any contracts, or the $47.92 million in profits, because of its bribes. PUGH contended its base offense level should be based on

the $129,138.81 amount of bribes PUGH paid, which would result in a total offense level of 22 and a base fine of $1.2 million.[138]

B. Supplemental Briefing Before Sentencing

The district court ordered briefs addressing the fine amount. PUGH's brief reiterated its challenge to the PSI's calculations, arguing there was no evidence the County suffered any pecuniary loss from the bribery scheme.

The government recalculated PUGH's pecuniary gain based on a job-by-job analysis of PUGH's contracts with the County. The government submitted a list of bribery and post-bribery jobs, which showed the revenue earned, gross profit, gross profit percentage, and "improper gain" for each job. The government calculated an average unit price for items used by PUGH in eight of its projects over a 20-month period from 2001 to 2002 and then compared those prices for this time period to the average unit price PUGH charged the County for these items during the bribery period of 1997 to 2001. The government determined PUGH's improper gain was $24.667 million, while PUGH made about $20 million in

[138] PUGH's total did not use certain amounts that were included in the PSI, such as (1) $60,696 that PUGH claimed Swann repaid to PUGH, (2) $37,000 worth of unperformed work on Swann's home that PUGH paid Guthrie for, and (3) $167,679 in items PUGH gave to McNair.

"normal profit." Based on the improper gain of $24.667 million and applicable multipliers, the government concluded PUGH's guidelines fine range was $34.533 million to $69.067 million.[139]

PUGH's reply brief then challenged the government's recalculation for failing to account for a price increase that occurred in 2003 and for using artificially low post-bribery prices in 2001 and 2002. PUGH claims this skewed the government's analysis of PUGH's profits to reflect greater profits during the bribery period. PUGH also claimed that, to prove PUGH profited from the bribery scheme, the government had to show that PUGH's bribes caused the PRC to limit the number of cured-in-place contracts.

C. Sentencing Hearing

The district court conducted a lengthy sentencing hearing, including two days of evidence and a partial

---

[139] When comparing the unit prices of bribery-period and post-bribery jobs, the government's analysis used only PUGH's sewer rehab jobs – and not other jobs such as wastewater treatments, trunk sewer jobs, and annual contracts – so that the analysis would reflect an "apples-to-apples" comparison. FBI Agent Tom Mayhall stated PUGH earned about $55 million from other work from the County, which was not included in the improper gain calculation.

Although the government points out PUGH continued to make some bribes in 2001 and well into 2002, the majority of PUGH's bribes were given prior to December 31, 2000, and the government thus compared the profit before the end of 2000 with that in 2001-02.

day of argument on evidence assessment and factual determinations. The government presented evidence as to the bribes PUGH paid and the revenue and profits PUGH earned from its County contracts during the bribery scheme. For example, FBI Agent Tom Mayhall calculated PUGH's improper gains by comparing (1) the average unit price of items on invoices for sewer rehab jobs PUGH submitted to the County during the bribery scheme through the end of 2000 with (2) the average unit price of items on eight sewer rehab jobs PUGH performed in 2001 and 2002. Based on this comparison, Agent Mayhall concluded PUGH's improper gain was approximately $24.667 million.[140] Agent Mayhall testified about PUGH's bribes to County employees and the benefits PUGH received from its County contracts and as a result of the PRC's decisions. PUGH maintained that the increase in profits was not substantial and was based on areas of PUGH's business other than its work for the County.

The district court rejected the government's pricing analysis, finding that the evidence failed to

---

[140] Agent Mayhall testified PUGH made about $44.536 million total gross profit on about $109 million in revenue on JCESD rehab jobs during the bribery period. Mayhall testified that of this $44.536 million total gross profit, about $19.869 million was a result of PUGH's normal profit margin, and the remaining $24.667 million was therefore improper gain. Mayhall added that PUGH had about $22 million in cash on hand, which earned about $77,000 per month in interest, and bankruptcy creditors claimed less than $200,000 of that cash.

show the line items in PUGH's contracts were affected by the bribes PUGH paid. The court found PUGH paid bribes to County employees because PUGH was "afraid of what might happen if [it] did not do so" and that "what might have happened is that [PUGH] might have lost all its contracts, those current and future, with the County and the profits associated with those contracts."[141] The court further found, for example, "that the Swann bribes . . . were designed to ensure that [PUGH] stayed in good favor with Mr. Swann so that [PUGH] would have and continue to have the opportunity to receive contracts and be paid on contracts from Jefferson County." The court later stated "there [was] an expectation that if you do business with the County, you're expected to do this. And I think that the reason [PUGH] did it was because others were doing it and it wanted to protect the contracts it had."

The court also found that, beginning in August 1999, PUGH started making bribes "in order to maintain its standing in the revenues and profits realized in the contracts awarded by Jefferson County; and, indeed, they became extremely high profits during that bribe period."

The district court found that PUGH made its first bribe in August 1999 and its final bribe in September 2002. The court found that (1) from September 1,

---

[141] Judge David R. Proctor conducted the *Barber* trial and sentenced the Pugh defendants.

1999 to December 31, 2002, PUGH benefitted from the bribes, (2) during this 1999-2002 period PUGH generated from its County contracts a total profit of $43,985,869,[142] and (3) given PUGH's $107,887,832 in revenues, this $43,985,869 profit was a 40.77% profit margin during that period. Using that profit to calculate the base fine amount, the district court determined the guidelines fine range was $61,580,216 to $87,971,738. *See* U.S.S.G. §§ 8C2.5, 8C2.7. After considering PUGH's ability to pay, the district court reduced the fine to $21 million. The district court then gave a $1.6 million offset for fines paid by individuals who owned at least 5% of PUGH, which resulted in a final fine of $19.4 million.

D. Challenges to $19.4 Million Fine

On appeal, PUGH primarily raises objections to the manner in which the district court arrived at the $19.4 million fine, but none of them has merit. The PSI contained extensive financial information about PUGH's revenue and profits. The district court's

---

[142] The court found, "[t]he September 1, '99 date signifies the first contract awarded to Pugh by the County after the August 1999 concrete work was done for McNair." The court stated: "I have not attributed any profits made by Pugh in 2003, although the government may well have a good argument that profits in 2003 and revenues in 2003 continued to be effected [sic] because of the bribes paid in '99, 2000, 2001 and 2002." The court added: "Likewise, I have not attributed any pre-September 1999 gain to Pugh Construction based upon the bribe scheme that was in place and paid by other contractors."

fact-findings are supported by the record and undisputed facts in the PSI, and PUGH has shown no clear error in any of them. PUGH also has shown no legal error in any of the district court's calculations regarding the advisory guidelines fine range or in any other matters under the sentencing guidelines.

PUGH's brief as to the fine mainly resorts to claiming PUGH did not have adequate notice of certain arguments or adequate opportunity to respond. The record refutes those claims too. The parties submitted numerous sentencing briefs and offered a substantial amount of evidence as to PUGH's revenue and profits. PUGH claims it did not know the district court would consider that the bribes were paid out of fear of losing contracts or future payments thereon. However, PUGH's counsel, in arguing that the bribes were unrelated to the PRC, relied on the fact that the contractors feared what would happen if they did not pay bribes:

> [L]et me explain to [the court] why I think the contractors make such payments to public officials.
>
> . . . .
>
> [T]he best testimony that I heard about that was from Mr. William Dawson. Mr. Dawson was an engineer, independent, who was doing work for Jefferson County. . . . Mr. McNair invited him to come by the studio. And when he got there, Mr. McNair said, Mr. Dawson I've never asked you for anything before, but what I would like is for you to buy

> me an audio-visual equipment, some sort of a projector or something of that nature, and he had a book. And he said this is the model and this is what I would like to have. Well, Mr. Dawson didn't want to do that. And he went home and he thought about it and finally he did it. And he did it because he was afraid of what Chris McNair would do to him if he didn't.
>
> So when these people come and put the touch on a contractor or someone, I think it's the fear of the unknown.

In closing arguments, PUGH's trial counsel maintained that any benefits PUGH provided to the County employees were given purely out of friendship. PUGH cannot now claim it had an inadequate opportunity to explain its motivation in paying bribes or to prepare for the ultimate approach the district court took in deciding on the amount of the fine. If anything, counsel's argument succeeded in reducing the amount of the fine imposed to well below the advisory guidelines range of $61,580,216 to $87,971,738. PUGH has shown no reversible error in any procedural aspects of the sentencing proceedings before the district court in PUGH's case.

XV. CONCLUSION

We affirm all of the defendant-appellants' convictions except PUGH's conviction on Count 75, which we reverse. We affirm McNair's sentence. We affirm Swann's sentence except as to the amount of the fine.

While there was no legal error in the imposition of some fine for Swann, we vacate and remand as to the amount of the fine. As to PUGH's sentence, we (1) affirm the district court's findings of fact as supported by the record; and (2) conclude there was no error in the district court's calculations under the sentencing guidelines; but (3) in light of the reversal of its Count 75 conviction, we vacate PUGH's sentence and remand for resentencing without Count 75.[143]

AFFIRMED IN PART, REVERSED IN PART, VACATED AND REMANDED IN PART.

---

[143] PUGH was convicted and sentenced on 24 counts of conviction, and the reversal on Count 75 does not appear to impact its overall sentence. However, in an abundance of caution, we vacate PUGH's sentence and remand for resentencing by the district court because, at a minimum, Count 75 must be removed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA

VS.

JEWELL C. "CHRIS" McNAIR
GRADY R. "ROLAND" PUGH
JOSEPH E. "EDDIE" YESSICK
ROLAND PUGH
CONSTRUCTION, INC.
BOBBY J. RAST
DANIEL B. "DANNY" RAST,
RAST CONSTRUCTION, INC.
FLOYD W. "PAT" DOUGHERTY
F. W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.

CR 05-PT-61-S

Defendants

MEMORANDUM OPINION

RE: *QUID PRO QUO*

(Filed Mar. 27, 2006)

An issue which permeates various motions and arguments in this case relates to whether the Government must allege and prove specific claims of *quid pro quo* with regard to Title 18 Section 666 conspiracy and substantive counts. The court will herein generally discuss the issue and adopts this memorandum opinion as to any specific motions wherein that issue is raised.

The issue of whether there must be an allegation and proof of a specific *quid pro quo* under Title 18 Section 666 is at least partially illuminated by a consideration of cases which discuss Title 18 Section 201. Section 201 has provisions relating to both "bribery" and to "illegal gratuities."[1]

In *U. S. v. Sun-Diamond Growers of Calif.*, 526 U. S. 398, 404 (1999), the court distinguished between "bribery" as described in §§ 201(b)(1) and 201(b)(2) and "illegal gratuity" as described in §§ 201(c)(1)(A) and 201(c)(1)(B). The Court stated, "The distinguishing feature of each crime is its intent element. Bribery requires intent 'to influence' an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act. In other words, for bribery there must be a *quid pro quo* – a specific intent to give or receive something of value in exchange for an official act."

While *Sun-Diamond* suggests that bribery requires some proof of a *quid pro quo*, it does not say that there must be an allegation or proof of a specific act, only "something of value" intended to influence. To the contrary, the *Sun-Diamond* court notes, without disapproval, that the U. S. Court of Appeals for the District of Columbia Circuit, "stated that the

---

[1] The term "bribery" is sometimes referred to in the captions of statutes, but not in the provisions thereof. The court in *U. S. v. Medley*, 913 F.2d 1248, 1258 (7th Cir. 1990) agreed that the term "bribery" is "merely a 'shorthand way' of explaining the statutory charge. . . ."

Government need not show that a gratuity was given 'for or because of' any particular act or acts: 'That an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute – as long as the jury is required to find the requisite intent to reward the past favorable acts or to make future ones more likely.' *Id.*, at 969." 526 U.S. at 403-04. While *Sun-Diamond* involved illegal gratuities, this language is pertinent to the bribery provisions of Section 666.

Section 666 makes no reference to any specific *quid pro quo*. It refers to "corruptly" and "intent to influence or reward." This court recognizes that a generalized hope of some future benefit or a vague expectation of some future benefit may not be sufficient to make a payment a bribe. The key is whether a payment was "corruptly" made or received with the intent to influence or be influenced.

It cannot be reasonably disputed that Section 666 does not require that the government trace the flow of federal funds to any particular project. *U. S. v. Parodies*, 98 F.3d 1266, 1288 (11th Cir. 1996); *U. S. v. Fischer*, 168 F.3d 1273 (11th Cir. 1999). *Aff'd* 529 U. S. 667 *U. S. v. Bonito*, 57 F.3d 167, 172-73 (2d Cir. 1996).

The Eleventh Circuit Pattern Criminal Jury Instructions with regard to Section 666 does not suggest the necessity of finding any specific *quid pro quo*. In essence, the pertinent elements are knowingly accepting or agreeing to accept (or give) a thing of

value with the intent to be rewarded (or reward) in connection with a transaction or series of transactions.

The court in *U. S. v. Jennings*, 160 F.3d 1006, 1014 directly addressed the issue. The court states:

> Direct evidence of intent is unnecessary, however. To prove bribery under § 201, the government is not required to prove an expressed intention (or agreement) to engage in a quid pro quo. Such an intent may be established by circumstantial evidence. *See United States v. Massey*, 89 F.3d 1433, 1439 (11th Cir. 1996); *United States v. Biaggi*, 909 F.2d 662, 684 (2d Cir. 1990). Also, the government need not show that the defendant intended for his payments to be tied to specific official acts (or omissions). Bribery requires the intent to effect an exchange of money (or gifts) for specific official action (or inaction), but each payment need not be correlated with a specific official act. *See Arthur*, 544 F.2d at 734. Rather, it is sufficient to show that the payor intended for each payment to induce the official to adopt a specific course of action. *See id.* In other words, the intended exchange in bribery can be "this for these" or "these for these," not just "this for that." Further, it is not necessary for the government to prove that the payor intended to induce the official to perform a set number of official acts in return for the payments. The quid pro quo requirement is satisfied so long as the evidence

> shows a "course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor." *Id.* (internal quotation omitted). Thus, all that must be shown is that payments were made with the intent of securing a specific type of official action or favor in return. For example, payments may be made with the intent to retain the official's services on an "as needed" basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf. *See id.* This sort of "I'll scratch your back if you scratch mine" arrangement constitutes bribery because the payor made payments with the intent to exchange them for specific official action.

The court further states:

> Jennings argues that § 666 adopts § 201's bribe regime and then stops. He points out that § 666(a)(2) only prohibits payments given "corruptly," just like the general bribery provision, § 201(b), and unlike the illegal gratuity provision, § 201(c). This similarity to § 201(b) (and corresponding dissimilarity to § 201(c)), Jennings claims, shows that § 666 prohibits only bribery. Moreover, § 666's punishment provision allows up to ten years in prison, with nothing comparable to § 201(c)'s two-year cap for an illegal gratuity. *See* 18 U.S.C. § 666(a). Thus, Jennings argues that in order to convict him, the government had to prove that he bribed Morris.

> As we explain below (in part II.C.), Jennings's conviction must stand because the evidence was sufficient to prove that he intended to influence Morris's official acts by paying him money, that is, Jennings intended to engage in a quid pro quo. Jennings's intent therefore was sufficiently corrupt to call his payments "bribes" (or "rewards").As a result, we need not decide today whether § 666 also covers "gratuities," that is, payments made for or because of an official act.

U.S. v. Jennings, 160 F.3d at 1014-15. (Footnotes omitted).

* * *

> Under § 666(a)(2) the intent of the payor, not the intent of the payee, is determinative of whether a crime occurred. *See Mariano*, 983 F.2d at 1159 ("The common thread that runs through [18 U.S.C. §§ 666(a)(2) and 201(b)] is the intent of the payer, by the greasing of palms, to affect the future actions of a public official."); *see also Campbell*, 684 F.2d at 148 n. 11("the donor may be convicted of giving a bribe even despite the fact that the recipient had no intention of altering his official activities" (internal quotation omitted)). Thus, the only intent at issue was Jennings's: if he gave money to Morris with the requisite corrupt intent, Jennings violated the statute regardless of Morris's intent in accepting the money.

* * *

> Even if the evidence did not necessarily link each of Jennings's payments to a specific official act by Morris, a reasonable juror could still conclude that Jennings paid bribes. Over a fairly short period Morris approved over $650,000 worth of contracts for Jennings's companies, and Jennings paid Morris over $7,000 in cash. Again, a reasonable juror could have concluded that there was a course of conduct involving payments flowing from Jennings to Morris in exchange for a pattern of official actions favorable to Jennings's companies, and that was sufficient to convict Jennings of bribery. *See Arthur*, 544 F.2d at 734. Accordingly, the district court did not err when it denied Jennings's motion for an acquittal.

U. S. v. Jennings, 160 F.3d at 1017-18.

This court recommends a full reading of Jennings.

In *Sabri v. United States*, 541 U. S. 600, 605-06 (2004), the court stated:

> *It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of quid pro quo for some dereliction in spending a federal grant.* Cf. *Salinas v. United States*, 522 U.S. 52, 56-57, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (The "expansive, unqualified" language of the statute "does not support the

> interpretation that federal funds must be affected to violation § 666(a)(1)(B)"). *But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.* Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. *And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers. See Westfall v. United States*, 274 U.S. 256, 259, 47 S.Ct. 629, 71 L.Ed. 1036 (1927) (majority opinion by Holmes, J.) (upholding federal law criminalizing fraud on a state bank member of federal system, even where federal funds not directly implicated). It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here, and on a bribe that goes well beyond liquor and cigars. (Emphasis added).

In *U. S. v. Medley*, 913 F.3d 1248, 1260 (7th Cir. 1990), the court states:

> Nor is this a case where some distinction has to be drawn between a bribe and a gratuity, which are both illegal under different parts of the statute. In practice those two charges, in which the intent involved is important, have been difficult to distinguish. *United*

States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978); *United States v. Arroyo*, 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U. S. 1069, 99 S.Ct. 838, 59 L.Ed.2d 34 (1979); *United States v. Brewster*, 506 F.2d 62 (D.C.Cir. 1974). The essential element of a section 666 violation is a "quid pro quo"; that is, whether the payment was accepted to influence and reward an official for an improper act.

This court is satisfied that the *quid pro quo* required is proof of the intent to corruptly influence or be influenced as to some one or more acts or series of acts, not some specifically defined act or acts that must be alleged.

This the 27th day of March, 2006.

/s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11476-EE, 07-11644-EE,
08-10428-EE, 08-10433

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEWELL C. "CHRIS" MCNAIR,
JACK W. SWANN,
BOBBY J. RAST,
FLOYD W. PAT DOUGHERTY,
F.W. DOUGHERTY ENGINEERING &
ASSOCIATES, INC.,
RAST CONSTRUCTION, INC.,
ROLAND PUGH CONSTRUCTION, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

BEFORE: CARNES, HULL AND ANDERSON,
Circuit Judges.

ON PETITION(S) FOR REHEARING AND
PETITIONS) FOR REHEARING EN BANC

(Filed Jul. 20, 2010)

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M Hull
UNITED STATES
CIRCUIT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	No.2:05-CR-00061-RBP-TMP
Plaintiff	)	VIOLATIONS:
JEWELL C. "CHRIS" McNAIR, GRADY R "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.	)	18 U.S.C. § 666, Bribery Concerning Programs Receiving Federal Funds; 18 U.S.C. § 371, Conspiracy; 18 U.S.C. § 1503, Obstruction; and 18 U.S.C. § 2, Aiding and Abetting.
Defendants.	)	

SECOND SUPERSEDING INDICTMENT

(Filed Aug. 30, 2005)

INTRODUCTION

The Grand Jury Charges, as to These Defendants:

At all times relevant to this Indictment, unless otherwise stated:

THE GOVERNMENT OF JEFFERSON COUNTY

1. Jefferson County, Alabama, ("Jefferson County") was a county within the Northern District of Alabama with an elected County Commission as its governing body. Among the powers of Jefferson County was the ability to negotiate and enter into contracts for sewer construction and emergency sewer repairs. Jefferson County received more than $10,000 in assistance from the United States government each year relevant to this indictment. The Jefferson County Commission was an elected body composed of five commissioners. One commissioner had oversight for the operation of the Jefferson County Environmental Services Department ("JCESD").

THE JEFFERSON COUNTY ENVIRONMENTAL SERVICES DEPARTMENT

3. Between 1996 and the end of 2003, the Jefferson County Environmental Services Department ("JCESD"), a department of Jefferson County, supervised the process of repairing and rehabilitating the sewer system in Jefferson County and bringing the wastewater system into compliance with the Clean Water Act.

4. The JCESD Product Review Committee was a group of engineers and sewer technicians that decided which sewer pipe-lining products would qualify as acceptable for use in Jefferson County. During the time period relevant to this indictment, the Product Review Committee approved the pipe-lining products for the companies who

could then have those products included in bids on sewer rehabilitation work in Jefferson County.

5. Between 1996 and 2003, Jefferson County awarded over a billion dollars ($1,000,000,000) worth of engineering and construction contracts in order to comply with the consent decree.

DEFENDANTS

6. Defendant JEWELL C. "CHRIS" McNAIR was elected as a member of the Jefferson County Commission, was employed by Jefferson County, and had oversight of the JCESD. During the time period relevant to this Indictment, Defendant McNair was the majority owner of McNair Frame & Photo Art, Inc. ("McNair Studio").

7. Defendant GRADY R. "ROLAND" PUGH was the Chairman of the Board and seventy per cent owner of Roland Pugh Construction, Inc. ("PUGH, INC.") from at least 1998 until the time of indictment.

8. Defendant JOSEPH E. "EDDIE" YESSICK was the President and ten per cent owner of Roland Pugh Construction, Inc. ("PUGH, INC.") from at least 1998 until the time of indictment.

9. Defendant ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC.") was an Alabama corporation that, along with its joint venture partner, performed at least $100 million worth of sewer construction contracts for Jefferson County and the JCESD between 1997 and the end of 2003. During this time period, the majority of PUGH, INC.'s work was for the JCESD.

10. Defendant BOBBY J. RAST was the President and 41.5 per cent owner of Rast Construction, Inc. ("RAST, INC.").

11. Defendant DANIEL B. "DANNY" RAST was the Executive Vice President and 41.5 per cent owner of Rast Construction, Inc. ("RAST, INC.").

12. Defendant RAST CONSTRUCTION, INC. ("RAST, INC.") was an Alabama corporation that, along with its joint venture partner, performed at least $100 million worth of sewer construction contracts for Jefferson County and the JCESD between 1997 and the end of 2003. During this time period, the majority of RAST, INC.'s work was for the JCESD.

13. Defendant FLOYD W. "PAT" DOUGHERTY ("DOUGHERTY") was the President and fifty per cent owner of F.W. Dougherty Engineering & Associates, Inc. ("FWDE, INC.").

14. Defendant F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC. ("FWDE, INC.") was an Alabama corporation that received at least $20 million worth of "no bid" engineering contracts for Jefferson County and the JCESD between 1997 and the end of 2003. During this time period, the majority of FWDE's work was for the JCESD.

COUNT ONE

(18 U.S.C. § 371 – Conspiracy to Commit Bribery)

THE CONSPIRACY

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. JEWELL C. "CHRIS" McNAIR; GRADY R. "ROLAND" PUGH; JOSEPH E. "EDDIE" YESSICK; ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC."); BOBBY J. RAST; DANIEL B. "DANNY" RAST; RAST CONSTRUCTION, INC. ("RAST, INC."); FLOYD W. "PAT" DOUGHERTY; and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC. ("FWDE, INC.") are hereby named as DEFENDANTS in this count.

3. From in or about August 1999, and continuing through March 29, 2001, the exact dates being unknown to the Grand Jury, within the Northern District of Alabama and elsewhere, Defendants McNAIR; ROLAND PUGH; YESSICK; PUGH, INC.; BOBBY RAST; DANNY RAST; RAST, INC.; DOUGHERTY; FWDE, INC.; and others known and unknown to the Grand Jury, did knowingly and willfully combine, conspire, and agree with each other and others, both known and unknown to the Grand Jury, to commit offenses against the United States, to wit:

   (a) to corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government

received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, and series of transactions of such county government involving anything of value of $5,000 or more, in violation of Title 18 United States Code, Section 666(a)(2); and

(b) being an agent of the county government, which county government received federal assistance in excess of $10,000 in a one-year period, to corruptly solicit and demand for the benefit of any person, and accept and agree to accept, anything of value from any person, intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of such county government involving anything of value of $5,000 or more, in violation of Title 18, United States Code, Section 666(a)(1)(B).

THE OBJECTS OF THE CONSPIRACY

4. It was an object of the conspiracy for Defendant McNAIR, the Jefferson County Commissioner responsible for the JCESD, to enrich himself by corruptly soliciting and accepting things of value with the intent of being influenced and rewarded for supporting the interests of Defendants ROLAND PUGH; YESSICK; PUGH, INC.; BOBBY RAST; DANNY RAST; RAST, INC.; DOUGHERTY; and FWDE, INC., in connection with the JCESD sewer construction contracting program.

5. It was further an object of the conspiracy for Defendants ROLAND PUGH; YESSICK; PUGH, INC.; BOBBY RAST; DANNY RAST; RAST, INC.; DOUGHERTY; FWDE, INC.; and others known and unknown to the Grand Jury, aided and abetted by each other, to corruptly give, offer, and agree to give things of value to Defendant McNAIR with the intent of influencing Jefferson County and the JCESD and rewarding McNair for his supporting their interests in connection with the JCESD sewer construction contracting program.

MANNER AND MEANS OF THE CONSPIRACY

6. It was part of the conspiracy that Defendant McNAIR, while he was the Jefferson County Commissioner responsible for the JCESD, would and did corruptly solicit and accept: construction, remodeling, and cash totaling at approximately $175,000 for McNair Frame & Photo Art, Inc. at 45 6th Avenue South, Birmingham, Alabama ("McNair Studio"); from Defendants ROLAND PUGH; YESSICK; PUGH, INC.; BOBBY RAST; DANNY RAST; RAST, INC.; DOUGHERTY; and FWDE, INC., among others, who were contractors and engineers that performed work for the JCESD.

7. It was part of the conspiracy that Defendants ROLAND PUGH; YESSICK; PUGH, INC.; BOBBY RAST; DANNY RAST; RAST, INC.; DOUGHERTY; and FWDE, INC., would and did corruptly offer, give, and agree to give: construction, remodeling, and cash for McNair Frame &

Photo Art, Inc. at 45 6th Avenue South, Birmingham, Alabama ("McNair Studio") to Jewell C. "Chris" McNair.

8. It was further part of the conspiracy that Defendant McNAIR would and did corruptly provide influence and favorable treatment to Defendants ROLAND PUGH; YESSICK; PUGH, INC.; BOBBY RAST; DANNY RAST; RAST, INC.; DOUGHERTY; and FWDE, INC., among others, in conjunction with Jefferson County and contracting on JCESD matters in exchange for the many bribes paid by these defendants.

OVERT ACTS

1. In August 1999, the exact dates being unknown to the Grand Jury, Defendant PUGH, INC. poured concrete for, and form [sic] the foundation and walls of the basement of McNair Frame & Photo Art, Inc., located at 45 6th Avenue South in Birmingham, Alabama, ("McNair Studio") at a cost of approximately $11,709 for the benefit of Defendant McNAIR.

2. On or about October 1999, the exact dates being unknown to the Grand Jury, Defendant DOUGHERTY caused agents of FWDE, INC. to work with Defendant McNAIR in reviewing the plans and designs for construction of improvements at McNair Studio.

3. Between October 1999 and March 29, 2001, the exact dates being unknown to the Grand Jury, Defendant DOUGHERTY caused Bill Bailey, an employee of FWDE, INC., to work as a supervisor

of construction at McNair Studio at a cost of approximately $62,707 and for the benefit of Defendant McNAIR.

5 [sic]. On or about May 24, 2000, Defendant ROLAND PUGH instructed Grady Pugh to fly an airplane owned by Defendant PUGH, INC. to LaGrange, Georgia, to buy carpet and flooring material for The benefit of Defendant McNAIR.

6. On or about May 24, 2000, Defendant ROLAND PUGH caused Grady Pugh to pay $4,820 to The Mill Store, Inc. for carpet and tile for installation at McNair Studio for the benefit of Defendant McNAIR.

9 [sic]. On or about July 28, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $2,100 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

10. On or about August 4, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $1,400 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

11. On or about August 11, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $2,100 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

12. On or about August 18, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $2,450 to Barry Mosley for

carpentry work at McNair Studio for the benefit of Defendant McNAIR.

13. On or about August 25, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $2,500 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

14. On or about September 1, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,000 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

15. On or about September 8, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,975 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

16. On or about September 12, 2000, Defendant DANNY RAST caused Defendant RAST, INC. to pay Master Access Controls, Inc. $2,933 for an automatic security gate at McNair Studio for the benefit of Defendant McNAIR.

17. On or about September 15, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,125 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

18. On or about September 22, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,435 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

19. On or about September 29, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,660 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

20. On or about October 6, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,125 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

21. On or about October 6, 2000, Defendant BOBBY RAST caused agents of Defendant RAST, INC. to pay $1,880 to Clint Gilley for carpet installation at McNair Studio for the benefit of Defendant McNAIR.

22. On or about October 13, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,600 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

23. On or about October 16, 2000, agents for Defendant PUGH, INC. purchased custom hand railings from Thompson Fabricating LLC at a cost of $5,500 for installation at McNair Studio for the benefit of Defendant McNAIR.

24. On or about October 18, 2000, Defendant DANNY RAST caused Defendant RAST, INC. to pay Master Access Controls, Inc. $2,933 for an automatic security gate at McNair Studio for the benefit of Defendant McNAIR.

25. On or about October 20, 2000, Defendant BOBBY RAST caused agents of Defendant RAST, INC. to

pay $3,421 to Clint Gilley for carpet installation at McNair Studio for the benefit of Defendant McNAIR.

26. On or about October 20, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,200 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

27. On or about October 27, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,100 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

28. On or about November 3, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $2,010 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

29. On or about November 11, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,525 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

31 [sic]. On or about November 17, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $3,185 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

32. On or about December 1, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $1,125 to Barry

Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

33. On or about December 5, 2000, Defendant DANNY RAST caused Defendant RAST, INC. to pay $5,500 to Bailey and Sons for landscaping work at McNair Studio for the benefit of Defendant McNAIR.

34. On or about December 8, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $1,200 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

35. On or about December 22, 2000, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay $1,050 to Barry Mosley for carpentry work at McNair Studio for the benefit of Defendant McNAIR.

36. In or about January 2001, the exact dates being unknown to the Grand Jury, Defendant ROLAND PUGH caused Grady Pugh to deliver an envelope, on behalf of Defendant PUGH, INC., containing at least $10,000 in cash, to Defendant McNAIR.

37. On or about January 2001, the exact dates being unknown to the Grand Jury, Defendants BOBBY RAST and DANNY RAST caused agents of Defendant RAST, INC. to fabricate and install stairs, at a cost of several thousand dollars, for the back entrance to McNair Studio for the benefit of Defendant McNAIR.

38. On or about January 2001, the exact dates being unknown to the Grand Jury, Defendants BOBBY

RAST and DANNY RAST caused agents of Defendant RAST, INC. to fabricate and install an elevated concrete deck, at a cost of several thousand dollars, at McNair Studio for the benefit of Defendant McNAIR.

39. On or about March 13, 2001, agents for Defendant PUGH, INC. purchased additional custom hand railings from Thompson Fabricating LLC at a cost of $11,700 for installation at McNair Studio for the benefit of Defendant McNAIR.

All in violation of Title 18 U.S.C. Section 371.

COUNTS TWO to TWELVE

(18 U.S.C. § 666 – Bribery)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. JEWELL C. "CHRIS" McNAIR is hereby named as DEFENDANT in these counts.

3. From at least July 2000 and continuing at least through March 29, 2001, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendant JEWELL C. "CHRIS" McNAIR being an agent of the county government, which county government received federal assistance in excess of $10,000 in a one-year period, did corruptly solicit and demand for the benefit of any person, and accept and agree to accept, anything of value from any person, intending to be influenced and

rewarded in connection with any business, transaction, and series of transactions of such government involving anything of value of $5,000 or more, to wit: Defendant McNAIR, being an employee of Jefferson County, Alabama, corruptly solicited, accepted, and agreed to accept the following:

– From Grady R. "Roland" Pugh; Grady R. Pugh, Jr.; Joseph E. "Eddie" Yessick; and Roland Pugh Construction, Inc.:

Count 2: Hand railings with an approximate value of $5,500;

Count 3: Hand railings with an approximate value of $11,700;

Count 4: Money totaling at least $30,000;

– From Bobby J. Rast; Daniel B. "Danny" Rast; and Rast Construction, Inc.:

Count 5: Construction work and carpentry provided by Barry Mosley with an approximate value of $52,990;

Count 6: Installation of a security gate by Master Access Controls with an approximate value of $5,866;

Count 7: Installation of carpet by Clint Gilley with an approximate value of $5,300;

Count 8: Landscaping work by Bailey and Sons with an approximate value of $5,500;

Count 9: Fabrication and construction of a set of stairs with an approximate value of several thousand dollars;

Count 10: Construction of a concrete deck with an approximate value of several thousand dollars;

– From Floyd W. "Pat" Dougherty and F.W. Dougherty Engineering & Associates, Inc.:

Count 11: Supervision and project management by Bill Bailey with an approximate value of $27,434; and

– From William H. Dawson:

Count 12: Installation of an audio visual system worth $16,400,

in each instance intending to be influenced and rewarded in connection with the JCESD sewer construction contracting program.

Each Count in Violation of Title 18 United States Code, Section 666(a)(1)(B).

COUNTS THIRTEEN to FIFTEEN

(18 U.S.C. § 666 – Bribery)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. GRADY R. "ROLAND" PUGH; JOSEPH E. "EDDIE" YESSICK; and ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC.") are hereby named as DEFENDANTS in these counts.

3. From at least July 2000 and continuing at least through March 29, 2001, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendants ROLAND PUGH; YESSICK; and PUGH, INC., aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such county government involving anything of value of $5,000 or more, to wit: Defendants ROLAND PUGH, YESSICK and PUGH, INC. corruptly offered, gave, and agreed to give to Jewell C. "Chris" McNair:

Count 13: $20,000 in cash, (as to Defendants YESSICK and PUGH, INC. only);

Count 14: An envelope of cash containing at least $10,000 in January 2001 (as to Defendants ROLAND PUGH and PUGH, INC. only); and

Count 15: Installation of hand railings with a total approximate value of $17,200 (as to PUGH, INC. only);

in each instance with intent to influence and reward an agent of Jefferson County and to be rewarded in connection with the JCESD sewer construction contracting program.

Each Count in Violation of Title 18 United States Code, Sections 666(a)(2) and 2.

COUNT NINETEEN to TWENTY-FOUR

(18 U.S.C. § 666 - Bribery)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. BOBBY J. RAST; DANIEL B. "DANNY" RAST; and RAST CONSTRUCTION, INC. ("RAST, INC.") are hereby named as DEFENDANTS in this count.

3. From at least July 2000 and continuing at least through March 29, 2001, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendants BOBBY RAST; DANNY RAST; and RAST, INC., aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such county government involving anything of value of $5,000 or more, to wit: Defendants BOBBY RAST; DANNY RAST; and RAST, INC. corruptly offered, gave, and agreed to give to Jewell C. "Chris" McNair.

Count 19: Construction work and carpentry provided by Barry Mosley with an approximate value of $52,990;

Count 20: Installation of a security gate by Master Access Controls with an approximate value of $5,866;

Count 21: Installation of carpet by Clint Gilley with an approximate value of $5,300;

Count 22: Landscaping work by Bailey and Sons with an approximate value of $5,500;

Count 23: Fabrication and construction of a set of stairs with an approximate value of several thousand dollars (as to RAST, INC. only); and

Count 24: Construction of a concrete deck with an approximate value of several thousand dollars (as to RAST, INC. only);

in each instance intending to influence and reward an agent of Jefferson County and to be rewarded in connection with the JCESD sewer construction contracting program.

Each Count in Violation of Title 18 United States Code, Sections 666(a)(2) and 2.

COUNT TWENTY-EIGHT

(18 U.S.C. § 666 – Bribery)

1. The allegations in the first fourteen paragraphs of this indictment are realleged and incorporated herein.

2. FLOYD W. "PAT" DOUGHERTY; and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC. ("FWDE, INC.") are hereby named as DEFENDANTS in these counts.

3. From July 2000 and continuing through March 29, 2001, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama

and elsewhere, Defendants DOUGHERTY and FWDE, INC., aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such county government involving anything of value of $5,000 or more, to wit: Defendants DOUGHERTY and FWDE, INC. corruptly offered, gave, and agreed to give to Jewell C. "Chris" McNair:

Count 28: Supervision and project management by Bill Bailey with an approximate value of $27,434;

in each instance intending to influence and reward an agent of Jefferson County and to be rewarded in connection with the JCESD sewer construction contracting program.

Each Count in Violation of Title 18 United States Code, Sections 666(a)(2) and 2.

COUNT SEVENTY to SEVENTY-ONE

(18 U.S.C. § 666 – Bribery)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. JOSEPH E. "EDDIE" YESSICK and ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC.")

are hereby named as DEFENDANTS in this count.

3. From at least March 2000 and continuing at least through November 2001, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendants YESSICK and PUGH, INC., aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such county government involving anything of value of $5,000 or more, to wit: Defendants YESSICK and PUGH, INC. corruptly offered, gave, and agreed to give:

Count 70: A trip to Bienville Plantation in White Springs, Florida with a value of approximately $1,000; and

Count 71: A condominium rental at Pelican Beach Condominiums on the Gulf of Mexico, with a value of $610,

in each instance intending to influence and reward Harry Chandler and to be rewarded in connection with the JCESD sewer construction contracting program.

Each Count in Violation of Title 18 United States Code, Sections 666(a)(2) and 2.

COUNT SEVENTY-TWO

(18 U.S.C. § 666 – Bribery)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. BOBBY J. RAST and RAST CONSTRUCTION, INC. ("RAST, INC.") are named as DEFENDANTS in this Count.

3. On or about May 2002, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendants BOBBY RAST and RAST, INC., aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such government involving anything of value of $5,000 or more, to wit: Defendants BOBBY RAST and RAST, INC. corruptly offered, gave, and agreed to give an envelope containing $2,500 cash to Harry T. Chandler, an employee of Jefferson County, intending to influence and reward him and to be rewarded in connection with the JCESD sewer construction contracting program.

All in Violation of Title 18 United States Code, Sections 666(a)(2) and 2.

COUNT EIGHTY-SEVEN

(18 U.S.C. § 666 – Bribery)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. BOBBY J. RAST, and RAST CONSTRUCTION, INC. ("RAST, INC.") are named as DEFENDANTS in this Count.

3. In May 2002, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendants BOBBY RAST and RAST, INC. aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of the county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such government involving anything of value of $5,000 or more, to wit: Defendants BOBBY RAST and RAST, INC. corruptly offered, gave, and. agreed to give $1,000 cash to Donald R. Ellis, an engineer with the JCESD, intending to influence and reward him in connection with the JCESD sewer construction contracting program.

All in violation of Title 18 United States Code, Sections 666(a)(2) and 2.

COUNT EIGHTY-NINE

(18 U.S.C. § 666 and 2 – Bribery)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. Defendants DANIEL B. "DANNY" RAST and RAST CONSTRUCTION, INC. ("RAST, INC.") are named as DEFENDANTS in this Count.

3. On or about December 2000, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendants DANIEL B. "DANNY" RAST and RAST CONSTRUCTION, INC. ("RAST, INC."), aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of the county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such government involving anything of value of $5,000 or more, to wit: Defendants DANNY RAST and RAST, INC. corruptly offered, gave, and agreed to give an envelope containing $1,000 cash, to Larry P. Creel, an employee of the JCESD, intending to influence and reward him in connection with the JCESD sewer construction contracting program and Product Review Committee.

All in violation of Title 18 United States Code, Section 666(a)(2) and 2.

COUNT ONE HUNDRED TWENTY-SIX

(18 U.S.C. § 1503 – Obstruction)

1. The allegations in the first fourteen paragraphs of this Indictment are realleged and incorporated herein.

2. BOBBY J. RAST and RAST CONSTRUCTION, INC. are hereby named as DEFENDANTS in this count.

3. From on or about June 2003 and continuing until the date of Indictment, in the Northern District of Alabama and elsewhere, Defendants BOBBY RAST and RAST, INC. did corruptly obstruct and impede an official proceeding, specifically Grand Jury empaneled in the Northern District of Alabama which were investigating allegations of corruption, fraud, bid rigging, and other violations of federal law.

4. The defendants obstructed justice by intentionally providing a false affidavit of compliance with grand jury subpoena to the Grand Jury in the Northern District of Alabama. The false statement was material to the investigations, and thereby obstructed and impeded the Grand Jury's Investigation.

All in violation of Title 18 United States Code, Section 1503.

TRUE BILL

/s/ _____

GRAND JURY FOREMAN

ALICE H. MARTIN
UNITED STATES ATTORNEY

____/s/_____
WILLIAM D. DILLON
TRIAL ATTORNEY

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	**NO.: 2:05-CR-00544-LSC-TMP**
Plaintiff,	)	**VIOLATIONS:**
v.	)	**18 U.S.C. § 666 Bribery Concerning Programs Receiving Federal Funds;**
JACK W. SWANN, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.,	)	**18 U.S.C. § 371, Conspiracy; 18 U.S.C. § 1503, Obstruction; 18 U.S.C. § 1341, Mail Fraud; and 18 U.S.C. § 2 Aiding and Abetting**
Defendants.	)	

SECOND SUPERCEDING INDICTMENT

(Filed Aug. 30, 2005)

INTRODUCTION

The Grand Jury Charges, as to these Defendants:

At all times relevant to this Indictment, unless otherwise stated:

THE GOVERNMENT OF JEFFERSON COUNTY

1. Jefferson County, Alabama, ("Jefferson County") was a county within the Northern District of Alabama with an elected County Commission as its governing body. Among the powers of Jefferson County was the ability to negotiate and enter into contracts for sewer construction and emergency sewer repairs. Jefferson County received more than $10,000 in assistance from the United States government each year relevant to this indictment.

2. The Jefferson County Commission was an elected body composed of five commissioners. One commissioner had oversight for the operation of the Jefferson County Environmental Services Department ("JCESD").

THE JEFFERSON COUNTY ENVIRONMENTAL SERVICES DEPARTMENT

3. In or about 1994, the United States Department of Justice filed suit against Jefferson County and the Jefferson County Commission, alleging violations of the Clean Water Act.

4. In or about 1996, Jefferson County and the Jefferson County Commission entered into a consent decree with the U.S. Environmental Protection Agency ("EPA") under which Jefferson County agreed to repair its sewer system in order to comply with the Clean Water Act.

5. Between 1996 and the end of 2003, the Jefferson County Environmental Services Department ("JCESD"), a department of Jefferson County,

supervised the process of repairing and rehabilitating the sewer system in Jefferson County and bringing the wastewater system into compliance with the Clean Water Act.

6. The JCESD Product Review Committee was a group of engineers and sewer technicians that decided which sewer pipe-lining products would qualify as acceptable for use in Jefferson County. During the period of time relevant to this indictment, the Product Review Committee approved the pipe-lining products for the companies who could then have those products included in bids on sewer rehabilitation work in Jefferson County.

7. Between 1996 and 2003, Jefferson County awarded over a billion dollars ($1,000,000,000) worth of engineering and construction contracts in order to comply with the consent decree.

DEFENDANTS

8. Defendant, JACK W. SWANN, was employed by Jefferson County as the Director of the JCESD.

9. Defendant, JOSEPH E. "EDDIE" YESSICK was the President and ten percent owner of Roland Pugh Construction, Inc. ("PUGH, INC.") from at least 1998 until the time of indictment.

10. Defendant, ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC.") was an Alabama corporation that, along with its joint venture partner, performed at least $200 million worth of sewer construction contracts for Jefferson County and the JCESD between 1997 and the end of 2003.

During this time period, the majority of PUGH, INC's work was for the JCESD.

11. Defendant, BOBBY J. RAST, was the President and 41. 5 per cent owner of Rast Construction, Inc. ("RAST, INC.").

12. Defendant, DANIEL B. "DANNY" RAST, was the Executive Vice President and 41.5 per cent owner of Rast Construction, Inc. ("RAST, INC.").

13. Defendant, RAST CONSTRUCTION, INC. ("RAST, INC.") was an Alabama corporation that, along with its joint venture partner, performed at least $200 million worth of sewer construction contracts for Jefferson County and the JCESD between 1997 and the end of 2003. During this time period, the majority of the RAST, INC.'S work was for the JCESD.

14. Defendant, FLOYD, "PAT", DOUGHERTY ("DOUGHERTY") was the President and fifty percent owner of F.W. Dougherty Engineering & Associates, Inc. ("FWDE, INC.").

15. Defendant, F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC. ("FWDE, INC.") was an Alabama corporation that received at least $30 million worth of "no bid" engineering contracts for Jefferson County and the JCESD between 1997 and the end of 2003. During this time period, the majority of FWDE's work was for the JCESD.

COUNT 51

(18 U.S.C. § 371 – Conspiracy to Commit Bribery)

THE CONSPIRACY

1. The allegations in the first fifteen paragraphs of this Indictment are realleged and incorporated herein.

2. JACK W. SWANN; JOSEPH E. "EDDIE" YESSICK; ROLAND PUGH CONSTRUCTION INC. ("PUGH, INC."); BOBBY J. RAST; DANIEL B. "DANNY" RAST; RAST CONTRUCTION, INC. ("RAST, INC."); FLOYD "PAT" DOUGHERTY; and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC. ("FWDE, INC.") are hereby named as DEFENDANTS in this count.

3. From in or about September 1998, and continuing at least through November 2003, the exact dates being unknown to the Grand Jury, within the Northern District of Alabama and elsewhere, Defendants, SWANN; YESSICK; PUGH, INC.; BOBBY RAST; DANNY RAST; RAST, INC.; DOUGHERTY; and FWDE, INC., did knowingly and willfully combine, conspire, and agree with each other and others, both known and unknown to the Grand jury, to commit offenses against the United States, to wit:

   (a) to corruptly give, offer and agree to give anything of value to any person, with intent to influence and reward an agent of the county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, and series of transactions of such county

government involving anything of value of $5,000 or more, in violation of Title 18, United States Code, Section 666(a) (2); and

(b) being an agent of the county government, which county government received federal assistance in excess of $10,000 in a one-year period, to corruptly solicit and demand for the benefit of any person, and accept and agree to accept, anything of value from any person, intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of such county government involving anything of value of $5,000 or more, in violation of Title 18, United States Code, Section 666 (a) (1) (B).

THE OBJECTS OF THE CONSPIRACY

4. It was an object of the conspiracy for Defendant SWANN, the Director of the JCESD, to enrich himself by corruptly soliciting and accepting things of value with the intent of being influenced and rewarded for supporting the interests of Defendants YESSICK,; PUGH, INC.; BOBBY J. RAST; DANNY RAST, DOUGHERTY, and FWDE, INC., in connection with the JCESD sewer contracting program.

5. It was further an object of the conspiracy for Defendants, YESSICK,; PUGH, INC.; BOBBY J. RAST; DANNY RAST, DOUGHERTY, and FWDE, INC., aided and abetted by each other, to corruptly give, offer and agree to give things of value to Defendant SWANN with the intent of influencing and rewarding him for supporting their

interests in connection with the JCESD sewer construction program.

MANNER AND MEANS OF THE CONSPIRACY

6. It was part of the conspiracy that Defendant SWANN, while he was the Director or the JCESD, would and did corruptly solicit and accept construction, remodeling, and landscaping services valued at over $250,000 for his houses at 641 Winwood Drive, Vestavia Hills, Alabama; a trip to London, England in 1999 worth $4,510; a trip to Scotland and England in 2001 worth $3,015; and $1,000 in gift certificates for Alabama Booksmith from Defendants YESSICK,; PUGH, INC.; BOBBY J. RAST; DANNY RAST, DOUGHERTY, and FWDE, INC., contractors that performed work for the JCESD.

7. It was further part of the conspiracy that Defendants SWANN, YESSICK and PUGH, INC. attempted to conceal the existence of these bribes by, among other things, causing false and fraudulent invoices to be made and by making payments to PUGH, INC. totaling $60,696.95 after they learned of the bribery investigation.

8. It was also part of the conspiracy that Defendant SWANN would and did corruptly provide favorable treatment to Defendants YESSICK,; PUGH, INC.; BOBBY J. RAST; DANNY RAST, DOUGHERTY, and FWDE, INC. in conjunction with contracting on JCESD matters in exchange for the many bribes paid by these Defendants.

OVERT ACTS

1. Between September 1998 and September 1999, the exact dates being unknown to the Grand Jury, Defendant DOUGHERTY caused Wayne Hendon, an employee of Defendant FWDE, INC., to work at 645 Winwood Drive, Vestavia Hills, Alabama, as a supervisor of the construction process at the house of Defendant SWANN. The benefit to Defendant SWANN was approximately $51,616.

2. In or about September 1998, the exact dates being unknown to the Grand Jury, Defendant BOBBY RAST caused agents of RAST, INC. to tear down an existing carport at 645 Winwood Drive, Vestavia Hills, Alabama, at a cost of several thousand dollars, for the benefit of SWANN.

3. In or about the Fall of 1998, the exact dates being unknown to the Grand Jury, Defendant BOBBY RAST caused agents of RAST, INC. to pour several concrete slabs and walkways at 645 Winwood Drive, Vestavia Hills, Alabama, at a cost of several thousand dollars, for the benefit of Defendant SWANN.

4. On September 24, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,586 to Dudley Davis for construction work to the benefit of SWANN.

5. On October 1, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,586 to Dudley Davis for construction work to the benefit of SWANN.

6. On October 9, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,586 to Dudley Davis for construction work to the benefit of SWANN.

7. On October 15, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,586 to Dudley Davis for construction work to the benefit of SWANN.

8. On October 22, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $3,448 to Dudley Davis for construction work to the benefit of SWANN.

9. On October 29, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,155 to Dudley Davis for construction work to the benefit of SWANN.

10. On November 5, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,155 to Dudley Davis for construction work to the benefit of SWANN.

11. On November 12, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,155 to Dudley Davis for construction work to the benefit of SWANN.

12. On November 19, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $3,017 to Dudley Davis for construction work to the benefit of SWANN.

13. On December 3, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $2,155 to Dudley

Davis for construction work to the benefit of SWANN.

14. On December 10, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $1,551 to Dudley Davis for construction work to the benefit of SWANN.

15. On December 29, 1998, Defendant DOUGHERTY caused FWDE, INC. to pay $1,551 to Dudley Davis for construction work to the benefit of SWANN.

16. Between July 29, 1999 and August 14, 1999, Defendants BOBBY RAST and DANNY RAST caused Defendant RAST, INC. to pay approximately $4,510 for Defendant SWANN to travel to England for the benefit of SWANN.

17. On or about September 3, 1999, Defendant RAST, INC. paid $1,054 to Alabama Brick Delivery for masonry materials to the benefit of Defendant SWANN.

18. Between September 1999 and August 2000, the exact dates being unknown to Grand Jury, Defendant DANNY RAST caused Derek Houston, an agent of RAST, INC. to work at 645 Winwood Drive, Vestavia Hills, Alabama, as a supervisor of the construction process at the house of Defendant SWANN. The benefit to Defendant SWANN had an approximate value of $10,000.

19. On or about October 11, 1999, Defendant RAST, INC. paid $909 to Alabama Brick Delivery for masonry materials for the benefit of SWANN.

20. On or about May 25, 2000, Defendant BOBBY RAST caused an agent of RAST, INC. to pay $4,441 to Sherman International for concrete installed at the house of Defendant SWANN.

21. In or about June 2000, the exact dates being unknown to the Grand Jury, Defendant YESSICK, and other agents of Defendant, PUGH, INC., contacted "Aquatic Gardens" about installing a waterfall and decorative pond in the yard of Defendant SWANN.

22. In or about June, 2000, the exact dates being unknown to the Grand Jury, Defendant YESSICK, and other agents of Defendant PUGH, INC., contacted "Guthrie Landscaping" about installing landscaping in the yards of Defendant SWANN at 641 and 645 Winwood Drive, Vestavia Hills, Alabama.

23. On or about August 23, 2000, an agent of Defendant RAST, INC. paid $3,535 to Don's Carpet One to the benefit of SWANN.

24. Between September 2000 and April 2001, the exact dates being unknown to the Grand Jury, Defendant DOUGHERTY caused John Stanger, an employee of Defendant FWDE, INC., to work at 645 Winwood Drive, Vestavia Hills, Alabama, as a supervisor of the construction process at the house of Defendant SWANN. The benefit to Defendant SWANN had a approximate value of $24,176.

25. On or about September 14, 2000, an agent of RAST, INC. paid Kimro Painting $3,000 for painting at the home of Defendant SWANN.

26. On or about September 21, 2000, an agent of RAST, INC. paid Kimro Painting $3,000 for painting at the home of Defendant SWANN.

27. On or about September 27, 2000, an agent of RAST, INC. paid Kimro Painting $233 for an invoice on painting at the home of Defendant SWANN.

28. On or about September 28, 2000, an agent of RAST, INC. paid Kimro Painting $3,500 for an invoice on painting at the home of Defendant SWANN.

29. In or about November 2000, the exact dates being unknown to the Grand Jury, Defendant YESSICK instructed Guthrie Landscaping to bill Defendant PUGH, INC. for work at the house of Defendant SWANN, using job code "49908-E" for Defendant SWANN's existing house at 641 Winwood Drive, Vestavia Hills, Alabama.

30. In or about November 2000, the exact dates being unknown to the Grand Jury, Defendant YESSICK instructed Guthrie Landscaping to bill Defendant PUGH, INC. for work at the house of Defendant SWANN, using job code "49908-N" for Defendant SWANN's new house at 645 Winwood Drive, Vestavia Hills, Alabama.

31. On or about December 13, 2000, Defendant YESSICK caused Defendant PUGH, INC. to pay Guthrie Landscaping $15,635 for invoices on landscaping in the yards of Defendant SWANN.

32. On or about December 13, 2000, Defendant YESSICK caused Defendant PUGH, INC. to create an accounting entry on the accounting books

of Defendant PUGH, INC. to show a $100,000 landscaping expense to be incurred on Metro Park Roadway (PUGH, INC. job number 49908) in order to conceal the projected expenses to be incurred in landscaping the yards of Defendant SWANN.

33. On or about December 22, 2000, Defendant YESSICK caused Defendant PUGH, INC. to pay Aquatic Gardens $6,680 for an invoice on construction of a waterfall and pond in the yard of Defendant SWANN.

34. On or about January 16, 2001, Defendant YESSICK caused Defendant PUGH, INC. to pay Guthrie Landscaping $10,437 for an invoice on landscaping in the yards of Defendant SWANN.

35. On or about February 15, 2001, Defendant YESSICK caused Defendant PUGH, INC. to pay Guthrie Landscaping $33,622 for invoices on landscaping in the yards of Defendant SWANN.

36. On or about March 13, 2001, Defendant YESSICK caused Defendant PUGH, INC. to pay Guthrie Landscaping $15,201 for an invoice on landscaping in the yards of Defendant SWANN.

37. On or about April 12, 2001, Defendant YESSICK caused Defendant PUGH, INC. to pay Guthrie Landscaping $5,686 for invoices on landscaping in the yards of Defendant SWANN.

38. On or about July 16, 2001, agents for PUGH, INC. paid Guthrie Landscaping $603 for invoices on landscaping in the yards of Defendant SWANN.

39. On or about August 14, 2001, agents for PUGH, INC. paid Guthrie Landscaping $1,207 for invoices on landscaping in the yards of Defendant SWANN.

40. On or about August 14, 2001, Defendant YESSICK caused Defendant PUGH, INC. to pay Aquatic Gardens $742 for the final invoice on construction of a waterfall and pond in the yard of SWANN.

41. Between September 6, 2001 and September 21, 2001, Defendants BOBBY RAST and DANNY RAST caused RAST, INC. to pay approximately $3,015 for Defendant SWANN to travel to England and Scotland for the benefit of Defendant SWANN.

42. On or about September 14, 2001, agents for PUGH, INC. paid Guthrie Landscaping $6,835 for invoices on landscaping in the yards of Defendant SWANN.

43. On or about October 8, 2001, Defendant BOBBY RAST caused an agent of Defendant RAST, INC. to pay Brown Mechanical Contractors, Inc. $8,940 for plumbing at 645 Winwood Drive for the benefit of Defendant SWANN.

44. On or about October 16, 2001, agents for PUGH, INC. paid Guthrie Landscaping $2040 for invoices on landscaping in the yards of Defendant SWANN.

45. On or about November 16, 2001, agents for PUGH, INC. paid Guthrie Landscaping $1207 for invoices on landscaping in the yards of Defendant SWANN.

46. On or about December 14, 2001, Defendant YESSICK caused agents of RPC, INC. to pay $1000 to Alabama BookSmith for gift certificates for Defendant SWANN.

47. On or about December 18, 2001, agents for PUGH, INC. paid Guthrie Landscaping $1207 for invoices on landscaping in the yards of Defendant SWANN.

48. On or about January 16, 2002, Defendant YESSICK caused an agent of Defendant PUGH, INC. to issued a check to Guthrie Landscaping for $47,000 as payment for landscaping to be done in the yards of Defendant SWANN.

49. Between January 2002 and the summer of 2002, the exact dates being unknown to the Grand Jury, Guthrie Landscaping continued to do weekly landscaping in accordance with the earlier agreement with YESSICK and PUGH, INC.

50. In or about August, 2002, the exact dates being unknown to the Grand Jury, Defendant YESSICK caused an agent of Defendant PUGH, INC. to create a false and fraudulent invoice in the amount of $12,572.95, addressed to Frankie Pierce at 2275 N. Sherrlyn Drive, Birmingham, Alabama, in an effort to conceal the money that PUGH, INC. previously had paid Guthrie Landscaping for work done for Defendant SWANN.

51. On or about September 26, 2002, Defendant YESSICK caused an agent of Defendant PUGH, INC. to create a false and fraudulent invoice in the amount of $46,684, addressed to Mary Swann at 108 Morgan Street, Talladega, Alabama, in an

effort to conceal the money that PUGH, INC. previously paid Guthrie Landscaping and Aquatic Gardens for work done in the yards of SWANN.

52. On or about November 26, 2002, Defendant SWANN caused his wife to write a check to Defendant PUGH, INC. in the amount of $46,684 for work supposedly done for Mary Swann, but which work really had been done for the benefit of Defendant SWANN.

53. On or about December 16, 2002, Defendant SWANN caused his wife to write a check to Defendant PUGH, INC. in the amount of $12,572.95 for work supposedly done for Frankie Pierce, but which work really had been done for the benefit of Defendant SWANN.

54. On or about November 2, 2003, Defendant SWANN wrote a check to Defendant, PUGH, INC. for $1,440 for work supposedly done for Mary Swann, but which work really had been done for the benefit of Defendant, SWANN.

All in violation of Title 18 U.S.C. Section 371

COUNTS FIFTY-TWO to SIXTY

(18 U.S.C. § 666 – Bribery)

1. The allegations in the first fifteen paragraphs of this Indictment are realleged and incorporated herein.

2. JACK W. SWANN is hereby named as a DEFENDANT in this count.

3. From at least July 2000 and continuing at least through August 2002, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendant, JACK W. SWANN, being an agent of the county government, which county government received federal assistance in excess of $10,000 in a one-year period, did corruptly solicit and demand for the benefit of any person, and accept and agree to accept, anything of value from any person, intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of such government involving anything of value of $5,000 or more, to wit: Defendant SWANN, being an employee of Jefferson County, Alabama, corruptly solicited, accepted and agreed to accept the following:

– From Joseph E. "Eddie" Yessick and Roland Pugh Const 1 ruction [sic], Inc.:

Count 52: Landscaping from Guthrie Landscaping with an approximate value of $100,000;

Count 53: Installation of a waterfall and pond from Aquatic Gardens with an approximate value of $7422; and

Count 54: Gift certificates to Alabama BookSmith worth $1000;

– From Bobby J. Rast; Daniel B. "Danny" Rast; Rast Construction, Inc.:

Count 57: Painting from Kimro Painting with an approximate value of $9733;

Count 58: Plumbing from Brown Mechanical Contractors, Inc. with an approximate value of $8940; and

Count 59: Payments totaling $3,015 for a trip to England and Scotland; and

– From Floyd W. "Pat" Dougherty and F.W. Dougherty Engineering & Associates, Inc.:

Count 60: Supervision of construction work by John Stanger with an approximate value of $24,176,

in each instance intending to be influenced and rewarded in connection with the JCESD sewer construction contracting program.

Each Count in Violation of Title 18 United States Code, Sections 666(a)(1)(B).

COUNTS SIXTY-ONE TO SIXTY-THREE

(18 U.S.C. §666 – Bribery)

1. The allegations in the first fifteen paragraphs of this Indictment are realleged and incorporated herein.

2. JOSEPH E. "EDDIE" YESSICK; AND ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC.") are hereby named as DEFENDANTS in this count.

3. From at least July 2000 and continuing at least through August 2002, the exact dates being unknown to the Grand Jury, in the Northern District of Alabama and elsewhere, Defendants

YESSICK and PUGH, INC., aided and abetted by each other, did corruptly give, offer and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such county government involving anything of value of $5000 or more, to wit: Defendants YESSICK and PUGH, INC. corruptly offered, gave, and agreed to give to Jack W. Swann:

Count 61: Landscaping from Guthrie Landscaping with an approximate value of $140,680;

Count 62: Installation of a waterfall and pond from Aquatic Gardens with an approximate value of $7,422; and

Count 63: Gift certificates to Alabama BookSmith worth $1000,

in each instance intending to influence and reward Jack W. Swann and to be rewarded in connection with the JCESD sewer construction contracting program.

Each Count in violation of Title 18 United States Code, Sections 666(a) (2) and 2.

COUNTS SIXTY-FOUR to SIXTY-EIGHT

(18 U.S.C. §666 – Bribery)

1. The allegations in the first fifteen paragraphs of this Indictment are realleged and incorporated herein.

2. BOBBY J. RAST; DANIEL B. "DANNY RAST"; RAST CONSTRUCTION, INC. ("RAST, INC.") are hereby named as DEFENDANTS in this count.

3. From at least July 2000 and continuing at least through December 2001, the exact dates being unknown to the Grand Jury in the Northern District of Alabama and elsewhere, Defendants BOBBY J. RAST; DANNY RAST; and RAST, INC., aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such county government involving anything of value of $5000 or more, to wit: Defendants BOBBY J. RAST; DANNY RAST; and RAST, INC. corruptly offered, gave and agreed to give Jack W. Swann:

Count 66: Painting from Kimro Painting with an approximate value of $9733;

Count 67: Plumbing from Brown Mechanical Contractors, Inc. with an approximate value of 8,940; and

Count 68: Payments totaling $3,015 for a trip to England and Scotland,

in each instance intending to influence and reward Jack Swann and to be rewarded in connection with the JCESD sewer construction program.

Each Count in Violation of Title 18 United States Code, Sections 666(a) (2) and 2.

COUNT SIXTY-NINE

(18 U.S.C.§ 666- Bribery)

1. The allegations in the first fifteen paragraphs of this Indictment are realleged and incorporated herein.

2. FLOYD W. "PAT DOUGHERTY ("DOUGHERTY"); AND F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC. ("FWDE, INC.") are hereby named as DEFENDANTS in this count.

3. From at least July 2000 and continuing at least through April 2001, the exact dates being unknown to the Grand Jury in the Northern District of Alabama and elsewhere, Defendants DOUGHERTY and FWDE, INC., aided and abetted by each other, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of county government, which county government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such county government involving anything of value of $5000 or more, to wit: Defendants DOUGHERTY and FWDE, INC. corruptly offered, gave and agreed to give Jack W. Swann:

Count 69: Supervision of construction work by John Stanger with an approximate value of $24,176, intending to influence and reward Jack W. Swann and to be rewarded in connection with

the JCESD sewer construction contracting program.

All in Violation of Title 18 United States Code, Sections 666(a) (2) and 2.

COUNTS NINETY to ONE HUNDRED

(18 U.S.C. Section 1341, 1346 Honest Services Mail Fraud)

1. The allegations in the first fifteen paragraphs of this Indictment are realleged and incorporated herein.

2. JACK W. SWANN; JOSEPH E. "EDDIE" YESSICK; and ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC.") are named as defendants in these counts, as listed below.

The Duty of Honest Services

3. A public employee, such as an employee of the JCESD, is prohibited from soliciting or receiving a thing of value for himself or a family member for the purpose of influencing official action by the public employee.

4. No one can offer or give a thing of value to a public employee, such as an employee of the JCESD, or to a family member of the public employee for the purpose of influencing official action by the public employee.

The Scheme

5. From in or about March 2000 and continuing at least through December 2002, in the Northern District of Alabama and elsewhere, Defendants SWANN, YESSICK and PUGH, INC., and others known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud and deprive the State of Alabama and Jefferson County of their right to Defendant SWANN's honest services as an employee of the JCESD, performed free from deceit, fraud, dishonesty, favoritism, self-enrichment, and self dealing.

Manner and Means of the Scheme with SWANN

6. It was part of the scheme that Defendant SWANN, while he was the Director of the JCESD, would and **did** solicit and accept, as indicated below: landscaping with an approximate value of $140,000 from Defendants YESSICK and PUGH, INC., a contractor that performed work for the JCESD.

Execution of the Scheme

7. As indicated in the list below, in the Northern District of Alabama and elsewhere, Defendants SWANN, YESSICK and PUGH, INC., and others known and unknown, for the purpose of executing and attempting to execute this scheme and artifice to defraud, knowingly caused envelopes containing the checks listed below to be placed in an office of the U.S. Postal Service, and sent from

PUGH, INC., 1280 Powder Plant Road, Bessemer, AL 35022 addressed to Guthrie Landscaping, P.O. Box 405, Northport, AL 35746, to be sent and delivered by the U.S. Postal Service:

Count 90: Guthrie Landscaping check dated 12/13/00 for $15,635;

Count 91b Guthrie Landscaping check dated 1/16/01 for $10,437;

Count 92: Guthrie Landscaping check dated 2/14/01 for $33,622;

Count 93: Guthrie Landscaping check dated 3/13/01 for $15,201;

Count 94: Guthrie Landscaping check dated 4/12/01 for $5,686;

Count 95: Guthrie Landscaping check dated 7/16/01 for $603;

Count 96: Guthrie Landscaping check dated 8/14/01 for $1,207;

Count 97: Guthrie Landscaping check dated 9/14/01 for $6,835;

Count 98: Guthrie Landscaping check dated 10/16/01 for $2,040;

Count 99: Guthrie Landscaping check dated 11/16/01 for $1207;

Count 100: Guthrie Landscaping check dated 12/18/01 for $1207; and

All in violation of Title 18 United States Code, Sections 1341 and 1346, and 2.

COUNT ONE HUNDRED TWENTY-FIVE

(18 U.S.C.§1503 – Obstruction)

1. The allegations in the first fifteen paragraphs off this Indictment are realleged as incorporated herein.

2. ROLAND PUGH CONSTRUCTION, INC. ("PUGH, INC.") is named as the DEFENDANT in this count.

3. From on or about January 2003 and continuing until the date of Indictment, in the Northern District of Alabama and elsewhere, Defendant PUGH, INC. did corruptly obstruct and impede an official proceeding, specifically Grand Juries empaneled on September 18, 2002, and September 22, 2004 sitting in the Northern District of Alabama which were investigating allegations of corruption, fraud, bid rigging, and other violations of federal law.

4. The defendant obstructed justice by, among other things, intentionally withholding and destroying the following documents: George Word invoices for $34,150 and $10,042 that were paid for the benefit of Chris McNair; Guthrie Landscaping invoices for a total of $140,680 and Aquatic Gardens invoices paid for the benefit of Jack W. Swann; and documents relating to the McCalla land for $47,927 paid for the benefit of Clarence R. Barber, that the Grand Juries had subpoenaed and that were material to the investigation;

thereby obstructing or impeding the Grand Jury's investigation.

All in violation of Title 18 United States Code, Section 1503.

TRUE BILL

/s/

_____

GRAND JURY FOREMAN

ALICE H. MARTIN
UNITED STATES ATTORNEY

/S/

WILLIAM D. DILLON
TRIAL ATTORNEY

APPENDIX F

VOLUME XI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	Case No. CR05-PT-61-S
Plaintiff,	Birmingham, Alabama
VS.	
JEWELL C. "CHRIS" MCNAIR, GRADY R. "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.,	April 20-21, 2006 8:30 a.m.
Defendants.	

TRANSCRIPT OF TRIAL
HELD BEFORE THE
HONORABLE ROBERT B. PROPST SENIOR
UNITED STATES DISTRICT JUDGE, and a Jury

* * *

[2334] charged, other than Mr. McNair. I apologize. I had it right to start with. I just misread it.

Let me back up. These are instructions that are applicable to all of the defendants except Commissioner McNair. The defendants other than Jewell "C" Chris McNair are charged in various counts of violating a portion of Title 18, Section 666, which makes it a federal crime or offense for anyone to corruptly give, offer or agree to give anything of value to anyone who is an agent of a local government receiving significant benefits under a federal assistance program intending to reward or influence that agent in connection with any business, transactions, or series of transactions of such local government involving anything of value of $5,000 or more. I will more particularly tell you what the government must prove beyond a reasonable doubt before a defendant can be found guilty of such an offense.

So let me repeat that portion. What I'm telling you now, that with the exception of Count 1 of the indictment, and with the exception of the charges against Defendant McNair, and with the exception of one other statute that's involved in a couple of instances, all of the other charges against all of the defendants, except Defendant McNair, fall under this statute and this portion of the statute.

So I'm going to read that again and then I'll tell you with regard to each of these defendants what it is the [2335] government would have to prove beyond a reasonable doubt with regard to each of these defendants.

As I've said, the defendants, other than Jewell C. "Chris" McNair, are charged in various counts of violating a portion of Title 18, Section 666, which makes it a federal crime or offense for anyone to corruptly give, offer or agree to give anything of value to anyone who is an agent of a local government receiving significant benefits under a federal assistance program intending to reward or influence that agent in connection with any business, transaction, or series of transactions of such local government involving anything of value of $5,000 or more. As I said, I will do that more particularly with regard to each of the counts against each of these defendants.

Now, first, I'm going to tell you what the essential elements are with regard to the offenses charged against the Defendant Rast Construction, Inc.

Defendant Rast Construction, Inc. is charged in Counts 19 through 24 with violating United States Code, Title 18, Section 666.

The Defendant Rast Construction, Inc. can be found guilty of that offense only if all of the following are proved beyond a reasonable doubt:

First: That the Defendant Jewell C. "Chris" McNair was an agent of Jefferson County, Alabama, during the period from [2336] at least July 2000 through March 29, 2001.

That Jefferson County, Alabama was during each of the years 2000 and 2001, a county government

in Alabama. There's no real dispute that Jefferson County was a County government.

That during each of the years 2000 and 2001, Jefferson County, Alabama received benefits in excess of $10,000 under a federal program involving some form of federal assistance, such as a grant, contract, subsidy, loan, or guarantee insurance.

That during the period from at least July of 2000 to March 29, 2001, the Defendant Rast Construction, Inc. knowingly gave, offered or agreed to give things of value to Jewell C. "Chris" McNair as follows:

As to Count 19, construction work and carpentry provided by Barry Mosley with an approximate value of $52,990.

As to Count 20, installation of a security gate provided by Master Access Controls with an approximate value of $5,866.

As to Count 21, installation of carpet by Clint Gilley with an approximate value of $5,300.

As to Count 22, landscaping work by Bailey & Sons with an approximate value of $5,500.

As to Count 23, fabrication and construction of a set of stairs with an approximate value of several thousand dollars.

As to Count 24, construction of a concrete deck with an approximate value of several thousand dollars.

[2337] Fifth: And this is another thing that the government would have to prove beyond a reasonable doubt.

That each such gift, offer or agreement to give, that by each of those gifts, offer or agreement to give, the Defendant Rast Construction, Inc. corruptly intended to reward or influence Jewell C. "Chris" McNair in connection with a transaction, or series of transactions, with Jefferson County, Alabama, which transaction or series of transactions involved something of value of $5,000 or more.

Sixth: That in doing so, the Defendant Rast Construction, Inc. acted corruptly.

An act is done "corruptly" if it is performed voluntarily, deliberately, and dishonestly, for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means.

The term "agent" means a person authorized to act on behalf of a local government and includes an officer, employee, manager, or representative of local government.

Title 18, United States Code, Section 666, that code section does not prohibit all gifts by or to a public official, but only gifts with the corrupt intent to influence or reward specified government officials in connection with business, or transactions, or series of transactions, of that governmental entity. The

government does not have to prove [2338] that the particular federal funds or projects were affected.

Now another charge against the Defendant Rast Construction is in Count 72. Again, with it being charged with a violation of Title 18, Section 666. And it can be found guilty of that offense only if all of the following are proved beyond a reasonable doubt:

First: That Harry T. Chandler was an agent of Jefferson County, Alabama, on or on about May 2002.

Second: That Jefferson County, Alabama, was on or about May 2002, a local government in Alabama.

Third: That during the year 2002, Jefferson County received benefits in excess of $10,000 under a federal program involving some form of federal assistance, such as a grant, contract, subsidy, loan, or guarantee insurance.

Fourth: That on or about May 2002, the Defendant Rast Construction, Inc. knowingly gave, offered, or agreed to give things of value to Harry Chandler as follows:

An envelope containing $2,500 in cash.

Fifth: That by such gift, offer or agreement to give, the Defendant Rast Construction, Inc. corruptly intended to reward or influence Harry T. Chandler in connection with a transaction or a series of transactions with Jefferson County, which transaction or

series of transactions involved something of value of $5,000 or more.

Sixth: That in doing so, the Defendant Rast [2339] Construction, Inc. acted corruptly.

And as I've told you, an act is done "corruptly" if it is performed voluntarily, deliberately, and dishonestly, for the purpose of either accomplishing an unlawful end or result of accomplishing same otherwise lawful end or lawful result by an unlawful method or means.

The term "agent" means a person authorized to act on behalf of a local government and includes an employee, officer, manager, or representative of a local government.

Again, that code section does not prohibit all gifts by or to a public official, but only gifts with the corrupt intent to influence or reward specified government officials in connection with business, or transaction, or series of transactions of that government involving $5,000 or more. The government does not have to prove that particular federal funds or projects were affected.

Again, with regard to Rast Construction. Another count that Rast Construction, Inc. is charged in is in Count 87. Where it is charged with violating again, Title 18, Section 666, it can be found guilty of that count only if all of the following are proved beyond a reasonable doubt:

First: That Donald R. Ellis was an agent of Jefferson County, Alabama in May 2002.

That Jefferson County, Alabama was, in May 2002, a county government in Alabama.

[2340] That during the year 2002, Jefferson County, Alabama received benefits in excess of $10,000 under a federal program involving some form of federal assistance, such as a grant, contract, subsidy, loan or guarantee insurance.

That in May 2002, the Defendant Rast Construction, Inc. knowingly gave, offered or agreed to give things of value to Donald R. Ellis as follows: $1,000 in cash.

That by such offer or agreement to give, the Defendant Rast Construction, Inc. corruptly intended to reward or influence Donald R. Ellis in connection with a transaction or a series of transactions with Jefferson County, which transactions or series of transactions involve something of value of $5,000 or more.

Sixth: That in doing so, the Defendant Rast Construction, Inc. acted corruptly.

I told you what corruptly means with regard to the 18:666. And I've told you what agent means.

Again, I will remind you that that section does not prohibit all gifts by a public official, but only gifts with the corrupt intent to influence or reward specified government officials in connection with business,

or transactions, or a series of transactions of that governmental entity involving $5,000 or more. The government does not have to prove that particular federal funds or projects were affected.

Now, the Defendant Rast Construction is also charged in [2341] Count 89 with violating Title 18, Section 666. And it can be found guilty of that offense only if all of the following are proved beyond a reasonable doubt:

First: That Larry P. Creel was an agent of Jefferson County, Alabama on or about December 2000.

Second: That Jefferson County, Alabama was, on or about December 2000, a county government in Alabama.

Third: That during the year 2000, Jefferson County, Alabama received benefits in excess of $10,000 under a federal program involving some form of federal assistance, such as a grant, contract, subsidy, loan or guarantee insurance.

Fourth: That on or about December 2000, the Defendant Rast Construction, Inc. knowingly gave, offered or agreed to give things of value to Larry P. Creel as follows: That is, an envelope containing $1,000 in cash.

And that by such gift, offer or agreement to give, the Defendant Rast Construction, Inc. corruptly intended to reward or influence Larry P. Creel in connection with a transaction or series of transactions

with Jefferson County, which transaction or series of transactions involved $5,000 or more.

That in doing so the Defendant Rast Construction acted corruptly. I've told you what corruptly means in connection with that statute and I've told you what agent means.

Again, I remind you, and I've told you this, it's not all gifts but only those that are given with a corrupt intent. [2342] I'm not going to repeat every time – I've told you this several times – but I don't think I need to repeat it every time.

The Defendant Rast Construction, the last count that it's charged in, is a different type charge. All of the charges that I've told about thus far with regard to Rast Construction, other than the Count 1 conspiracy charge, all relate to charges concerning Title 18, Section 666.

In this particular charge, the Defendant Rast Construction, Inc. is charged in Count 126 with a violation of Title 18, United States Code, Section 1503. That section makes it a federal crime or offense for anyone to corruptly endeavor to influence, obstruct or impede the due administration of justice.

The Defendant Rast Construction, Inc. can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That there was a proceeding pending before a grand jury of this Court as described in the indictment;

Second: That the Defendant Rast Construction, Inc. knowingly and willfully – and I've defined those terms for you – endeavored to influence, obstruct or impede the due administration of justice in those grand jury proceedings, as charged, by intentionally providing a false affidavit of compliance with a grand jury subpoena to the grand jury of the [2343] Northern District of Alabama.

To "endeavor" means to strive or attempt to accomplish a goal or a result. And to endeavor to influence, obstruct or impede the due administration of justice, means to take some action for the purpose of swaying or changing or preventing or thwarting in some way any of the actions likely to be taken by the grand jury proceeding involved.

To act "corruptly" means to act knowingly, in this case, means to act knowingly and dishonestly with the specific intent to influence, obstruct or impede the due administration of justice.

While it must be proved that the defendant corruptly endeavored to influence, obstruct or impede the due administration of justice as charged, and that the natural and probable effect of the defendant's acts would be to influence, obstruct or impede the due administration of justice, it is not necessary for the government to prove that the grand jury proceeding was in fact influenced or obstructed or impeded in any way.

The government offered evidence regarding certain invoices that were alleged to have been discarded

prior to a subpoena being received or a grand jury being convened. I instruct you that there is no charge against any defendant based upon such alleged conduct, but you may consider it only for the purpose of determining whether the defendants [2344] intentionally provided a false affidavit of compliance as set forth in Count 126 of the indictment.

I'm next going to instruct you with regard to the remaining charges, other than Count 1, as those charges relate to the Defendant Daniel B. "Danny" Rast, and all of those remaining charges with regard to Daniel B. "Danny" Rast are charges that relate to Title 18, Section 666, which has generally been referred to as a bribery statute.

Now, Defendant Daniel Rast is charged in Counts 19 through 22 with violating that code section.

The Defendant Daniel B. "Danny" Rast can be found guilty of the offenses charged in Counts 19 through 22 – and each of these counts every time is to be considered by you separately and severally – unless all of the following are proved beyond a reasonable doubt:

First: That the Defendant Jewell C. "Chris" McNair was an agent of Jefferson County, Alabama during the period from at least July 2000 through March 29, 2001.

Second: That Jefferson County, Alabama was during each of the years 2000 and 2001, a county government in Alabama.

Third: That during each of the years 2000 and 2001, Jefferson County received benefits in excess of $10,000 under a federal program. I've told you what some of those programs may be.

That during each of the years 2000 and 2001, Jefferson [2345] County received benefits in excess of $10,000 under a federal program involving some form of federal assistance.

That during the period from at least July 2000 to March 29, 2001, the Defendant Daniel B. "Danny" Rast knowingly gave, offered or agreed to give things of value to Jewell C. "Chris" McNair as follows:

(1) As to Count 19, construction work and carpentry provided by Barry Mosley with an approximate value of a $52,990.

(2) As to Count 20, installation of a security gate provided by Master Access Controls with an approximate value of $5,866.

(3) As to Count 21, installation of carpet by Clint Gilley with an approximate value of $5,300.

(4) As to Count 22, landscaping work by Bailey & Sons with an approximate value of $5,500.

Fifth: That by each such gift, offer or agreement to give, the Defendant Daniel B. "Danny" Rast corruptly intended to reward or influence Jewell C. "Chris" McNair in connection with a transaction or series of transactions, with Jefferson County,

Alabama, which transaction or series of transactions involved something of value of $5,000 or more.

In doing so, the Defendant Daniel B. "Danny" Rast acted corruptly. I've told you what – I won't repeat this as far as Daniel Rast is concerned, but with regard to each of these [2346] counts against him, an act is done "corruptly" if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end, or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means.

The term "agent" means a person authorized to act on behalf of a local government and it includes an employee, officer, manager, or representative of local government.

That section does not prohibit all gifts by or to a public official but only gifts for the corrupt intent to influence or reward specified government officials in connection with business transactions or a series of transactions of that government entity and the government does not have to prove the particular federal funds or projects were affected.

The Defendant Daniel B. "Danny" Rast is also charged with a violation of Title 18, Section 666, in Count 89. And he can be found guilty of that offense only if all of the following facts are proven beyond a reasonable doubt:

That Larry P. Creel was an agent of Calhoun – excuse me, of Jefferson County. That Larry P. Creel

was an agent of Jefferson County, Alabama on or about December 2000.

That Jefferson County, Alabama was on or about 2000, a county government in Alabama.

Third: That during the year 2000, Jefferson County, [2347] Alabama received benefits in excess of $10,000 under a federal program.

That on or about December 2000, that Defendant Daniel B. "Danny" Rast knowingly gave, offered or agreed to give things of value to Larry P. Creel as follows:

An envelope containing $1,000 in cash.

And that by such gift, offer or agreement to give, the Defendant Daniel B. "Danny" Rast corruptly intended to reward or influence Larry P. Creel in connection with the transaction or series of transactions with Jefferson County, Alabama, which transactions or series of transactions involved something of value of $5,000 or more.

I've told you what the definition of an act being done corruptly and what agent means. Again, I remind you that not all gifts, but those with corrupt intent, and that the government does not have to prove that particular federal funds or projects were affected.

Now, I'll instruct you as to the charges against the Defendant Bobby J. Rast, other than the

instruction that I've given you with regard to Count 1 in which he's also charged.

The Defendant Bobby J. Rast is charged in Counts 19 through 22 with violating United States Code, Section 18, 666. He can be found guilty of those offenses charged in Counts 19 through 22 only if all of the facts are proved beyond a reasonable doubt.

[2348] First: That the Defendant McNair was an agent of Jefferson County during the period from July of 2000 through March 29, 2001.

That Jefferson County was during those years a county government in the years 2000 and 2001.

That during each of the years 2000 and 2001, Jefferson County received benefits in excess of $10,000 under a federal program.

That during the period from at least July 2000 to March 29, 2001, the Defendant Bobby J. Rast knowingly gave, offered or agreed to give things of value to Jewell C. "Chris" McNair as follows:

(1) As to Count 19, construction work provided by Barry Mosley with an approximate value of $52,990.

(2) As to Count 20, installation of a security gate provided by Master Access Controls with an approximate value of $5,866.

(3) As to Count 21, installation of carpet by Clint Gilley with an approximate value of $5,300.

(4) As to Count 22, landscaping work by Bailey & Sons with an approximate value of $5,500.

Fifth: That by each such gift, offer or agreement to give, the Defendant Bobby J. Rast corruptly intended to regard or influence Jewell C. "Chris" McNair in connection with a transaction or series of transactions with Jefferson County, [2349] Alabama, which transaction or series of transactions involved something of value of $5,000 or more.

Sixth: That in doing so, Bobby J. Rast acted corruptly.

I've told you what that means and I've told you what agent means. And I remind you again that not all gifts, only gifts that are given with corrupt intent to influence or reward.

Defendant Bobby J. Rast is charged in Count 72, again, with violating Title 18, Section 666. And he can be found guilty of that offense only if all of the following are proved beyond a reasonable doubt.

First: That Harry T. Chandler was an agent of Jefferson County on or about May 2002.

Second: That Jefferson County was, on or about May 2002, a county government in Alabama.

Third: That during the year 2002, Jefferson County, Alabama received benefits in excess of $10,000 under a federal program.

I've told you what type federal programs are involved and I'm not going to repeat that.

That on or about May 2002, the Defendant Bobby J. Rast, knowingly gave, offered or agreed to give things of value to Harry T. Chandler as follows: That is an envelope containing $2,500 in cash.

Fifth: That by such gift, offer or agreement to give the [2350] Defendant Bobby J. Rast corruptly intended to reward or influence Harry T. Chandler in connection with a transaction or a series of transactions with Jefferson County, Alabama, which transaction or series of transactions involved something of a value of $5,000 or more.

That in doing so, the Defendant Bobby J. Rast acted corruptly.

I told you what corruptly means and I told you what agent means. And I remind you that it's only gifts with the corrupt intent to influence or reward.

Defendant Bobby J. Rast is also charged in Count 87 with violating United States Code Section, Title 18, Section 666. He can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt.

First: That Donald R. Ellis was an agent of Jefferson County, Alabama in May 2002.

Second: That Jefferson County, Alabama was in May 2002, a county government in Alabama.

Third: That during the year 2002, Jefferson County received benefits in excess of $10,000 under a federal program involving some form of federal

assistance, as I told you. That's applicable to all of these counts under 18:666.

That in May 2002, the Defendant Bobby J. Rast knowingly gave, offered or agreed to give things of value to Donald R. Ellis as follows: $1,000 in cash.

[2351] That by such gift, offer or agreement to give, the Defendant Bobby J. Rast corruptly intended to reward or influence Donald R. Ellis in connection with a transaction or series of transactions with Jefferson County, which transactions or series of transactions involved something of value of $5,000 or more.

That in doing so, the Defendant Bobby J. Rast acted corruptly. I told you what corruptly means, what agent means, and that only gifts with the corrupt intent to influence or reward a governmental official.

All right. This is a count that Bobby J. Rast is charged in which is not a quote "bribery" type charge under 666. The Defendant Bobby J. Rast is charged in Count 126 with a violation of Title 18, United States Code, Section 1503. That section makes it a federal crime or offense for anyone to corruptly to endeavor or influence, obstruct or impede the due administration of justice. He can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt.

First: That there was a proceeding pending before a grand jury of this Court as described in the indictment.

Second: That the Defendant Bobby J. Rast knowingly and willfully endeavored to influence, obstruct or impede the due administration of justice in those grand jury proceedings, as charged, by intentionally providing a false affidavit of

* * *

VOLUME IX

UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006-OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

****

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[2314] SOMETHING OF VALUE OF $5,000 OR MORE.

AND SIX, THAT IN SO DOING, THE DEFENDANT PUGH ACTED CORRUPTLY.

THE DEFENDANTS BOBBY RAST, DANNY RAST AND RAST CONSTRUCTION ARE CHARGED IN COUNT 66 THROUGH 68 OF THE INDICTMENT WITH VIOLATION OF 18 USC SECTION 666. THE DEFENDANT BOBBY RAST CAN BE FOUND GUILTY OF THAT OFFENSE ONLY IF ALL OF THE FOLLOWING FACTS ARE PROVED BEYOND A REASONABLE DOUBT:

THAT JACK W. SWANN WAS AN AGENT OF JEFFERSON COUNTY, ALABAMA DURING THE PERIOD OF JULY 2000 THROUGH AT LEAST DECEMBER 2001 AS CHARGED.

SECOND, THAT JEFFERSON COUNTY, ALABAMA WAS DURING THE YEARS 2000 THROUGH 2001 A LOCAL GOVERNMENT IN ALABAMA.

THIRD, THAT DURING EACH OF THE YEARS 2000 AND 2001, JEFFERSON COUNTY, ALABAMA RECEIVED BENEFITS IN EXCESS OF $10,000 UNDER A FEDERAL PROGRAM INVOLVING SOME FORM OF FEDERAL ASSISTANCE.

FOURTH, THAT DURING THE PERIOD FROM JULY 2000 THROUGH AT LEAST DECEMBER OF 2001, THE DEFENDANT BOBBY RAST KNOWINGLY GAVE, OFFERED AND AGREED TO GIVE A THING OF VALUE TO JACK W. SWANN. THAT IS, AS TO COUNT 66, PAINTING BY KIMRO PAINTING WITH AN APPROXIMATE VALUE OF $9,733. AS TO COUNT 67, PLUMBING BY BROWN MECHANICAL CONTRACTORS, INCORPORATED WITH AN APPROXIMATE VALUE OF $8,940.

[2315] AS TO COUNT 68, PAYMENTS TOTALING $3,015 FOR A TRIP TO ENGLAND AND SCOTLAND. AND THE FIFTH ELEMENT WHICH IS COMMON TO EACH OF THOSE COUNTS, THAT BY SUCH GIVING, OFFERING OR AGREEING TO GIVE THINGS OF VALUE TO JACK W. SWANN, DEFENDANT BOBBY RAST INTENDED TO INFLUENCE OR REWARD JACK W. SWANN IN CONNECTION WITH ANY BUSINESS TRANSACTION OR SERIES OF TRANSACTIONS WHICH INVOLVED SOMETHING OF VALUE OF $5,000 OR MORE.

AND SIX, THAT IN SO DOING DEFENDANT BOBBY RAST ACTED CORRUPTLY.

THE DEFENDANT DANNY RAST CAN BE FOUND GUILTY OF THAT OFFENSE ONLY IF ALL OF THE FOLLOWING FACTS ARE PROVED BEYOND A REASONABLE DOUBT:

FIRST, THAT JACK W. SWANN WAS AN AGENT OF JEFFERSON COUNTY, ALABAMA

DURING THE PERIOD OF JULY 2000 THROUGH DECEMBER 2001 AS CHARGED.

SECOND, THAT JEFFERSON COUNTY, ALABAMA WAS DURING THE YEARS 2000 THROUGH 2001 A LOCAL GOVERNMENT IN ALABAMA.

THIRD, THAT DURING EACH OF THE YEARS 2000 AND 2001 JEFFERSON COUNTY, ALABAMA RECEIVED BENEFITS IN EXCESS OF $10,000 UNDER A FEDERAL PROGRAM INVOLVING SOME FORM OF FEDERAL ASSISTANCE.

FOURTH, THAT DURING THE PERIOD FROM JULY 2000 THROUGH AT LEAST DECEMBER OF 2001, THE DEFENDANT DANNY RAST KNOWINGLY GAVE, OFFERED AND AGREED TO GIVE A THING OF [2316] VALUE TO JACK W. SWANN. THAT IS, AS TO COUNT 66 PAINTING BY KIMRO PAINTING WITH AN APPROXIMATE VALUE OF $9,733.

AS TO COUNT 67, PLUMBING BY BROWN MECHANICAL CONTRACTORS, INCORPORATED WITH AN APPROXIMATE VALUE OF $8,940.

AS TO COUNT 68, PAYMENTS TOTALING $3,015 FOR A TRIP TO ENGLAND AND SCOTLAND.

THAT BY SUCH GIVING THE AND FIFTH ELEMENT WHICH IS COMMON TO ALL THOSE COUNTS THAT I JUST WENT OVER WITH MR. RAST, THAT BY SUCH GIVING, OFFERING OR AGREEING TO GIVE THINGS OF VALUE TO

JACK W. SWANN, DEFENDANT DANNY RAST INTENDED TO INFLUENCE OR REWARD JACK W. SWANN IN CONNECTION WITH ANY BUSINESS TRANSACTION OR SERIES OF TRANSACTIONS WHICH INVOLVE SOMETHING OF VALUE OF $5,000 OR MORE.

AND SIX, TIIAT IN SO DOING DEFENDANT DANNY RAST ACTED CORRUPTLY.

THE DEFENDANT RAST CONSTRUCTION CAN BE FOUND GUILTY OF THAT OFFENSE ONLY IF ALL OF THE FOLLOWING FACTS ARE PROVED BEYOND A REASONABLE DOUBT:

FIRST, THAT JACK W. SWANN WAS AN AGENT OF JEFFERSON COUNTY, ALABAMA DURING THE PERIOD OF JULY 2000 TO AT LEAST DECEMBER 2001 AS CHARGED.

SECOND, THAT JEFFERSON COUNTY, ALABAMA WAS DURING THE YEARS 2000 THROUGH 2001 A LOCAL GOVERNMENT IN ALABAMA.

[2317] THIRD, THAT DURING EACH OF THE YEARS 2000 AND 2001 JEFFERSON COUNTY, ALABAMA RECEIVED BENEFITS IN EXCESS OF $10,000 UNDER A FEDERAL PROGRAM INVOLVING SOME FORM OF FEDERAL ASSISTANCE.

FOURTH, THAT DURING THE PERIOD OF JULY 2000 THROUGH AT LEAST DECEMBER 2001 THE DEFENDANT RAST CONSTRUCTION KNOWINGLY GAVE, OFFERED AND AGREED TO GIVE A THING OF VALUE TO JACK W. SWANN,

THAT IS, AS TO COUNT 66, PAINTING BY KIMRO PAINTING WITH AN APPROXIMATE VALUE OF $9,733.

AS TO COUNT 67, PLUMBING BY BROWN MECHANICAL CONTRACTORS, INCORPORATED WITH AN APPROXIMATE VALUE OF $8, 940.

AS TO COUNT 68, PAYMENTS TOTALING $3,015 FOR TRIP TO ENGLAND AND SCOTLAND.

AND FIFTH, THE ELEMENT THAT IS COMMON TO THOSE CHARGES AGAINST RAST CONSTRUCTION THAT BY SUCH GIVING, OFFERING OR AGREEING TO GIVE THINGS OF VALUE TO JACK W. SWANN, DEFENDANT RAST CONSTRUCTION INTENDED TO INFLUENCE OR REWARD JACK W. SWANN IN CONNECTION WITH ANY BUSINESS TRANSACTION OR SERIES OF TRANSACTIONS THAT INVOLVED SOMETHING OF VALUE OF $5,000 OR MORE.

AND SIX, THAT IN SO DOING DEFENDANT RAST CONSTRUCTION ACTED CORRUPTLY.

THE DEFENDANTS DOUGHERTY AND DOUGHERTY

* * *

APPENDIX G-1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**NO.: 2:05-CR-00061-RBP-TMP**
JEWELL C. "CHRIS" MCNAIR, GRADY R. "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.	)	
Defendants.	)	

BOBBY J. RAST AND DANIEL B. "DANNY RAST"S MOTION FOR NEW TRIAL

Come now the Defendants, Bobby J. Rast (hereinafter referred to as "Bobby Rast") and Daniel B. ("Danny") Rast (hereinafter referred to as "Danny Rast"), separately and severally, pursuant to Rule 33, Federal Rules of Criminal Procedure, and respectfully

move the Court for a new trial as to Counts 1, 19, 20, 21, 22, 72 and 87 of the Second Superseding Indictment, separately and severally, on the following grounds, separately and severally, including those grounds raised by any Co-Defendant:

1. The Court erred in denying Defendants' Motion to Dismiss the Second Superseding Indictment.

2. The Court erred in denying Defendants' Motion to Strike Certain Portions of the Second Superseding Indictment.

3. The Court erred in denying Defendants' Motion for a James hearing.

4. The Court erred in denying Defendants' Motion in Limine to Exclude Evidence of Other Alleged Crimes, Wrongs or Acts and in admitting such testimony, including, but not limited to, the testimony of substantial deposits into Mr. McNair's account, and evidence regarding Jack Swann, and his home.

5. The Court erred in denying Defendants' Motion in Limine Regarding Allegations in the Introduction to the Second Superseding Indictment, and in denying Defendant's motion to prevent the Second Superseding Indictment to be published to the jury. The Court erred in providing the jury with copies of the indictment.

6. The Court erred in allowing the Government to offer evidence regarding cash deposits made on

behalf of defendant, Jewel C. "Chris" McNair, in that the admission of such evidence was overly prejudicial to defendants, Bobby Rast and Danny Rast. The trial judge erred in admitting such inflammatory, improper and prejudicial evidence.

7. The Court erred in overruling Defendants' objections made to questions asked by the Government to its own witnesses. (This ground will be supplemented upon completion of the transcript).

8. The Court erred in sustaining the Government's objections made to questions asked by the Defendant to the Government's witnesses. (This ground will be supplemented upon completion of the transcript).

9. The Court erred in overruling Defendants' objections made to exhibits offered by the Government.

10. The Court erred in denying Defendants' Motion for Judgment of Acquittal made at the close of the Government's case.

11. The Court erred in denying Defendants' Motion for Judgment of Acquittal made at the close of all the evidence.

12. The Court erred in overruling Defendants' Objections to the Magistrate Judge's Report and Recommendation, and in denying Defendant's Motion to Dismiss the Second Superceding Indictment.

13. The trial Court erred in refusing to give Defendants' written requested instructions on reasonable doubt (requested instruction #'s 2, 3, 4) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that a reasonable doubt can arise from the evidence, part of the evidence and lack of evidence and would have made clear the proper standard. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

14. The trial Court erred in refusing to give Defendants' written requested instructions on evidence of Defendants' good character (requested instruction #'s 7, 8 and 9) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that a reasonable doubt can arise from good character evidence. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

15. The trial Court erred in refusing to give Defendants' written requested instructions on Multiple Conspiracies (requested instruction #'s 13, 14 and 15) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt the existence of only one overall conspiracy and that if

they determined that there were several separate and independent conspiracies that did not include the Defendant individually (i.e.: Danny Rast or Bobby Rast) or both of the Defendants then they could find the Defendants not guilty. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

16. The trial Court erred in refusing to give Defendants' written requested instructions on Conspiracy and on The Existence of an Agreement (requested instruction #'s' 16, 20, 21, 22, 23, 24 and 25) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the Government had to prove beyond a reasonable doubt that there was a mutual understanding, i.e., an agreement, between two or more people to accomplish an unlawful act and the Defendants knowing participation in that agreement. Also, the Government had to prove beyond a reasonable doubt that the Defendants had knowledge of the overall scheme. The refusal of such charge denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

17. The trial Court erred in refusing to give Defendants' written requested instruction on Conspiracy, Membership(requested instruction #' 17) which was timely requested and objection made to its omission. The instruction would have had the effect of

explaining to the jury that the Government had to prove beyond a reasonable doubt that the Defendants with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in the conspiracy for the purpose of furthering the illegal undertaking. The refusal of such charge denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

18. The trial Court erred in refusing to give Defendants' written requested instructions on Conspiracy, Commission of an Overt Act (requested instruction #'s 18 and 19) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the Government had to prove beyond a reasonable doubt that the at least one of the overt acts alleged in the Second Superseding Indictment was knowingly and willfully committed by at least one of the conspirators and that the jury had to unanimously agree on which act was done. The refusal of such charge denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

19. The trial Court erred in refusing to give Defendants' written requested instructions on Bribery concerning a program receiving federal funds (requested instruction #'s 37 and 38) which were timely requested and objection made to their

omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendants gave something of value to Defendant McNair with the specific corrupt intent of obtaining a specific quid pro quo, i.e.: to improperly cause Defendant McNair to commit a specific act in favor of Defendant or with the specific corrupt intent of illegally rewarding McNair for having committed an act. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

20. The trial Court erred in refusing to give Defendants' written requested instructions 39, 40, 41, and 42 which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendants had a specific corrupt intent to give the specific things alleged to Chris McNair in exchange for some specific business or a specific business transaction connected with the JCESD sewer construction program. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

21. The trial Court erred in refusing to give Defendants' written requested instructions 43 and 44 which were timely requested and objection made to their omission. The instructions would have had the

effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendants did not give the things of value alleged in the Second Superseding Indictment to Chris McNair because of their friendship, but to corruptly influence or reward McNair in connection with specific business, specific transactions, or a series of specific transactions connected with the JCESD sewer construction program. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

22. The trial Court erred in refusing to give Defendants' written requested instructions 45, 46,47, 50 51, 52 and 53 which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendants had a corrupt purpose in providing gifts or services to McNair. Also, the instructions would have made it clear that the law does not forbid friendship between a citizen and a public official or for a citizen to give a public official a gift or service arising from that friendship or to foster a sense of good will even with a generalized hope of some ultimate benefit to the donor. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

23. The trial Court erred in refusing to give Defendants' written requested instructions 48 and 49 which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the Defendants have a constitutional right not to testify. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

24. The trial Court erred in refusing to give Defendants' written requested instructions on Good Faith Defense to Conspiracy (requested instruction 26, and 27) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendants acted with the specific intent to accomplish an unlawful act. Furthermore, the instructions explained that good faith is a complete defense to the conspiracy since good faith is inconsistent with knowingly and willfully conspiring to accomplish an unlawful plan. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

25. The trial Court erred in refusing to give Defendants' written requested instructions on Good Faith Defense to Bribery (requested instruction 28 and 29) which were timely requested and objection

made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendants acted with criminal intent. Furthermore, the instructions explained that good faith is a complete defense to the conspiracy since good faith is inconsistent with knowingly and willfully conspiring to accomplish an unlawful plan. The refusal of such charges denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

26. The Court erred in overruling Defendants' Objections to the Magistrate Judge's Report and Recommendation regarding the issue of *quid pro quo*. The trial Court found that in a bribery case the quid pro quo required is proof of the intent to corruptly influence or be influenced as to some one or more acts or series of acts, not some specifically defined act or acts which must be alleged. The trial Court in a written pretrial Memorandum Opinion specifically directed defendants to review the case of *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998). In his said opinion the trial Court quoted *Jennings* extensively as to the issue of *quid pro quo*, thereby giving Defendants the expectation that the trial Court would follow its own direction regarding the issue of *quid pro quo* and instruct the jury accordingly. However, during trial and prior to charging the jury, the Court stated that *Jennings* was not controlling and refused to instruct the jury regarding any

quid pro quo requirement. The Court in *Jennings* specifically stated: "Bribery requires the intent to effect an exchange of money (or gifts) for specific official action, (or inaction), but each payment need be correlated with a specific official act. "The quid pro quo requirement is satisfied as long as the evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor." Id at 144 (Emphasis added) The refusal of Defendant's charges on quid pro quo denied the Defendants their right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States, in that there was no evidence of any quid pro quo.

27. The trial Court erred in permitting the Government unfettered use of 404(b) evidence of each of all the defendants' acts. The court had discretion of whether or not to allow evidence of the cash deposits made by defendant McNair and allowed such testimony and evidence. The admission of such evidence was highly prejudicial to Defendants and denied their right to due process and to a fair trial under the Fifth and Sixth Amendments to the United States Constitution. Under Rule 403, Federal Rules of Evidence any relevance was clearly outweighed by the prejudice against these Defendants. The admission of such evidence only served to confuse the jury with extraneous and irrelevant information.

28. The Court erred in admitting evidence regarding any act by any defendant which may have occurred after March 29, 2001. The admission of such

evidence was highly prejudicial to Defendants Bobby and Danny Rast and denied them their right to due process and to a fair trial under the Fifth and Sixth Amendments to the United States Constitution. Under Rule 403, Federal Rules of Evidence, any relevance was clearly outweighed by the prejudice against these Defendants. The admission of such evidence only served to confuse the jury with extraneous and irrelevant information.

29. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt as to the guilt of the Defendants.

30. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offenses charged in Counts 1, 19, 20, 21, 22, 72, and 87 of the Second Superseding Indictment.

31. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of any violation of any law of the United States.

32. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants did not act in good faith.

33. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that any alleged gift or service provided by Defendants were not provided out of friendship or to promote good will.

34. The evidence presented by the Government was insufficient to prove beyond a reasonable doubt facts establishing federal jurisdiction. The first paragraph of the indictment simply alleges that "Jefferson County received more than $10,000 in assistance from the United States government each year relevant to this indictment." There is no further explanation regarding what type of "assistance" this was, or where the money was routed. Not just any funds from the federal government can qualify as "benefits" under 18 U.S.C. § 666(b). *Fischer v. United States*, 529 U.S. 667 (2000). "Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Fischer*, 529 U.S. at 681. The indictment fails to allege and there was no evidence that any federal funds were corruptly administered, were in any danger of being corruptly administered, or even could have been corruptly administered. Further, there was no allegation or proof that any of the alleged federal funds were in any way connected to the matters charged in the indictment.

35. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants had any intent to corruptly influence Chris McNair in the performance or execution of "some one or more acts or series of acts" of any kind pertaining the Jefferson County.

36. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants sought to obtain any form or benefit from Chris McNair at any time within the time frame of the Second Superceding Indictment.

37. Insufficient evidence was presented from which a reasonable jury could be convinced beyond a reasonable doubt that any conspiracy occurred as alleged in Count 1 of the Second Superseding Indictment.

38. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants acted with the requisite criminal intent as to Counts 1, 19, 20, 21, 22, 72, and 87 of the Second Superseding Indictment.

39. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants acted "knowingly" and "willfully" with regard to Counts 1, 19, 20, 21, 22, 72, and 87 of the Second Superseding Indictment.

40. Insufficient evidence was presented by the Government from which a reasonable jury could have been convinced beyond a reasonable doubt that the Defendants acted with the requisite corrupt intent as to Counts 1, 19, 20, 21, 22, 72 and 87 of the Second Superseding Indictment.

41. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense(s) charged in Counts 1, 19, 20, 21 and 22 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that work and services provided to Chris McNair were not merely provided to him as a gift, or out of goodwill or because of their friendship.

42. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the "overt acts" alleged to have been committed by any defendant were acts done in the furtherance of a conspiracy or that they were done with the necessary corrupt intent.

43. As to Counts 19, 20, 21, 22, 72 and 87 of the Second Superseding Indictment, there was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly and willfully had any corrupt intent whatsoever, or that any alleged gift or service was done knowingly and willfully with any corrupt intent to influence or to reward a county official.

44. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that there was insufficient evidence that Defendants came to any agreement or mutual understanding with anyone to accomplish any unlawful plan. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants agreed or conspired with any other person for any illegal purpose.

45. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants knowingly and willfully intended to voluntarily join in and participate in the conspiracy attempted to be alleged in Count 1 of the Second Superseding Indictment. Further, there was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was a conspiracy in progress at the time

46. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the purpose of the alleged conspiracy was for the alleged defendants "to corruptly give, offer, and agree to give things of value to any person with the intent to influence and reward an agent of county government."

47. There was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that the alleged conspiracy was carried out as described in the "Manner and Means of the Conspiracy" section, paragraphs 6, 7 and 8 of the Second Superseding Indictment. The acts described in said paragraphs are acts which if proven beyond a reasonable doubt would constitute separate completed acts, and not the manner and means by which the conspiracy, the "agreement", was carried out. There was no allegation in the indictment and no evidence offered by the Government as to the manner and means by which the defendants allegedly got together, made arrangements, or in any way conspired to do anything. Even paragraph 7 of Count 1 merely alleges that the defendants (other than McNair) "would and did corruptly offer, give, and agree to give: construction, remodeling and cash for McNair Frame and Photo Art, Inc . . . " There was no allegation and no

proof that any such alleged work was done as part of any conspiracy.

48. There was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was in fact any conspiracy as alleged in Count 1 of the Second Superseding Indictment in that the circumstantial evidence presented was inconsistent with an obvious and reasonable interpretation of the evidence and no more than conjecture supported the jury's finding of guilt.

49. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants conspired with anyone to "corruptly offer, give, and agree to give: construction, remodeling, and cash for McNair Frame and Photo Art, Inc. at 45 6th Ave. South, Birmingham, Alabama ("McNair Studio") to Jewel C. 'Chris' McNair." as alleged in paragraph 7 of the "Manner and Means of the Conspiracy" in the Second Superseding Indictment. There was no evidence whatsoever that Defendants acted with any corrupt intent.

50. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the

Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants conspired with another person or that he was aided and abetted by any other person to cause McNair to influence Jefferson County and the JCESD or to reward McNair in any manner.

51. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly, willfully and voluntarily participated in any conspiracy with any person as part of a single plan that ran from "late 1999 to late March, 2001."

52. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that a single plan or conspiracy existed. The only evidence was that there were different acts committed by different defendants at McNair's studio within a similar time

frame, but with no evidence whatsoever of any object or intent to influence or reward McNair in any way connected to such defendant's acts..

53. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants conspired with Defendant McNair or any other defendant for McNair to enrich himself by corruptly soliciting and accepting things of value as alleged in Count 1, paragraph 4 of the "Objects of the Conspiracy."

54. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants conspired with the defendants other than McNair to "corruptly give, offer and agree to give things of value to Defendant McNair" as alleged in paragraph 5 of the "Objects of the Conspiracy."

55. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants had a general understanding of an unlawful purpose of "the plan" or that he "knowingly and willfully joined in that plan on one occasion."

56. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants or any other defendant knowingly and willfully committed an overt act in an effort to carry out or accomplish some object of the alleged conspiracy.

57. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly and willfully associated with the crime and that he knowingly and willfully participated in it.

58. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 1 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that either Defendant was a knowing and willful participant in the alleged conspiracy.

59. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 19 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast or Danny Rast knowingly and willfully gave to Defendant Chris McNair construction work and carpentry provided by Barry Mosley with an approximate value of $52,900.00 with a corrupt intent to influence and reward McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

60. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 19 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly, willfully and corruptly intended to influence or reward Chris McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

61. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 20 of the Second Superseding Indictment. The amount alleged in Count 20 was alleged to have been comprised of separate checks received by Master Access Controls from Rast Construction, Inc in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants paid or caused Master Access Controls to be paid $5866.00.

62. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 20 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly and willfully gave to Defendant Chris McNair installation of a security gate provided by Master Access Controls with an approximate value of $5866.00 with a corrupt intent to influence and reward McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

63. Insufficient evidence was presented by the Government from which a reasonable jury could be

convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 20 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly, willfully and corruptly intended to influence or reward Chris McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

64. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 21 of the Second Superseding Indictment. The amount alleged in Count 21 was alleged to have been comprised of separate checks received by Clint Gilley from Rast Construction, Inc. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants paid or caused Clint Gilley to be paid a total of $5300.00.

65. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 21 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be

convinced beyond a reasonable doubt that Defendants knowingly and willfully gave to Defendant Chris McNair installation of a carpet by Clint Gilley with an approximate value of $5300.00 with a corrupt intent to influence and reward McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

66. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 21 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly, willfully and corruptly intended to influence or reward Chris McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

67. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 22 of the Second Superseding Indictment. The amount alleged in Count 22 was alleged to have been comprised of funds received by Bailey and Sons from Rast Construction, Inc.

68. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 22 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly and willfully gave to Defendant Chris McNair landscaping work by Bailey and Sons with an approximate value of $5,500.00 with a corrupt intent to influence and reward McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

69. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendants were guilty of the offense charged in Count 22 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly, willfully and corruptly intended to influence or reward Chris McNair in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

70. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 72 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast knowingly and willfully gave, offered or agreed to give Harry T. Chandler an envelope containing $2500.00 with a corrupt intent to influence and reward Chandler in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

71. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 72 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast acted with corrupt intent in any association or transaction with Harry T. Chandler.

72. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 72 of the Second Superseding Indictment in that insufficient evidence was presented by the

Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast corruptly intended to reward or influence Harry T. Chandler in connection with a transaction or series of transactions with Jefferson County, Alabama which transactions involved something of value of $5000.00 or more.

73. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 72 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that funds provided to Harry T. Chandler were not merely provided to Harry T. Chandler as a gift. Mr. Chandler testified that he contacted Bobby Rast and that he asked Bobby Rast for help with expenses for a European trip. The trip was to be composed or [sic] academicians, representatives of industry, and city and county governments. The program was designed to improve trenchless technology and would likely have the effect of incurring competition. Harry T. Chandler further testified that he did not intend to ask for a bribe when he contacted Bobby Rast and that Bobby Rast did not ask Harry T. Chandler to do anything associated with any Jefferson County sewer project in return for the funds and that Chandler took no action to benefit Bobby Rast or Rast Construction, Inc. because of the gift. Furthermore, Harry T. Chandler

testified that the decisions he made as a county official were in the best interest of Jefferson County.

74. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense(s) charged in Count 72 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that funds provided to Harry T. Chandler were not merely provided to him as a gift, because of their friendship to assist Chandler in going on the trip..

75. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 87 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast acted with corrupt intent in any association or transaction with Donald Ellis.

76. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 87 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be

convinced beyond a reasonable doubt that Bobby Rast knowingly, willfully and corruptly intended to reward or influence Donald R. Ellis in connection with a transaction or series of transactions with Jefferson County, Alabama which transactions involved something of value of $5000.00 or more.

77. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 87 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast knowingly, willfully and corruptly gave, offered or agreed to give Donald R. Ellis $1000.00 with a corrupt intent to influence and reward Ellis in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more

78. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 87 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that funds provided to Donald R. Ellis were not merely provided to Donald R. Ellis as a gift. Mr. Chandler testified

that he contacted Bobby Rast and that he asked Bobby Rast for help with expenses for the educational trip to Europe at which he and Ellis were delivering a paper. Harry T Chandler further testified that he was not asking for a bribe when he contacted Bobby Rast and that Bobby Rast did not ask Harry T. Chandler to do anything associated with Jefferson County sewer program in return for the funds. Harry T. Chandler testified that Bobby Rast told him to divide the funds with Donald R. Ellis in that Ellis was also going on the trip to deliver a paper. Ellis acknowledged that he was going on the trip, that he was going to deliver a paper, and that the trip was not a "boondoggle," i.e., a pleasure trip.

79. Bobby Rast was charged in Count 87 with giving Donald R. Ellis $1000.00 cash. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 87 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast gave Donald R. Ellis any funds. Donald R. Ellis claimed that Clay Bailey gave him $5000.00 and that he gave Harry Chandler one-half of the funds. Donald R. Ellis's testimony completely contradicted Harry T. Chandler's testimony and the allegation contained in Count 87 of the Second Superseding Indictment.

80. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Bobby Rast was guilty of the offense charged in Count 87of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that any monies given to Donald R. Ellis were not merely provided to him as a gift to assist him in going on the trip described above and not as a bribe. Ellis testified that he did not take any action favorable to Bobby Rast or Rast Construction because osf [sic] the alleged gift, and acted in the best interest of Jefferson County, and made no decisions on the Product Review Committee which were not in the best interest of Jefferson County.

81. Insufficient evidence was presented by the Government as to each count of the indictment in that the Government wholly failed to prove any quid pro quo for the alleged gifts and services of which a reasonable jury could be convinced beyond a reasonable doubt.

82. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that any gift or services provided by Bobby Rast was done with a corrupt intent as charged in Counts 19, 20, 21, 22, 72 and 87.

83. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that there was any quid pro quo to be provided in connection with the alleged bribes charged in Counts 19, 20, 21, 22, 72 and 87.

Dated this 28th day of April, 2006.

/s/ William N. Clark
Attorney for Defendants
Bobby Rast and Danny Rast

OF COUNSEL:
REDDEN, MILLS & CLARK
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457 – office
(205) 322-8481 – fax

CERTIFICATE OF SERVICE

I hereby certify that on I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Alice H. Martin, Esq.
United States Attorney's Office
1801 4th Avenue N.,
Birmingham, Alabama 35203
Alice.martin@usdoj.gov

William Dillon, Esq.
United States Attorney's Office
Richard B. Russell Building
75 Spring Street, S.W.,
Ste. 1176
Atlanta, GA 30303
William.dillon@usdoj.gov

Ronald W. Wise, Esq.
2000 Interstate Park Drive, Suite 105
Montgomery, Alabama 36109
melisslinn@aol.com
Attorney for Joseph E. "Eddie" Yessick

G. Douglas Jones, Esq.
Whatley Drake LLC
2323 Second Avenue North
Post Office Box 10647
Birmingham, AL 35202-0647
ecf@whatleydrake.com
Attorney for Jewell C. McNair

Terry W. Gloor, Esq.
800 Shades Creek Parkway, Ste. 335
Birmingham, Alabama 35209
millscm@bellsouth.net
Attorney for Rast Construction, Inc

Michael Rasmussen
130 Inverness Plaza #175
Birmingham, AL 35242
rasmussenlaw@charter.net
Attorney for Roland Pugh

J. Stephen Salter, Esq.
2107 Fifth Avenue, North
Birmingham, Alabama 35203
umstakwit@aol.com
Attorney for Floyd W. Pat Dougherty and F. W. Dougherty Engineering & Associates, Inc.

Mark T. Calloway, Esq.
Alston & Bird LLP
101 S. Tryon Street, Ste. 4000
Charlotte, NC 28280
mcalloway@alston.com
Attorney for Roland Pugh Construction, Inc.

Michael L. Brown, Esq.
Alston Bird, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
Mike.brown@alston.com

Fournier J. Gale, III, Esq.
Maynard. Cooper & Gale PC
AmSouth Harbert Plaza, Suite 2400
1901 6th Avenue North
Birmingham, AL 35203
bgale@maynardcooper.com

David Flint
dflint@swfllp.com
Attorney for Roland Pugh Construction, Inc.

Katie Loggins Vreeland, Esq.
AmSouth Harbert Plaza,
Suite 2400
1901 6th Avenue North
Birmingham, AL 35203
kvreeland@maynard
cooper.com
Attorney for Roland Pugh
Construction, Inc.

Anil A. Mujumadar, Esq.
2323 Second Avenue North
Birmingham, AL 35202
ecf@whatelydrake. com
Attorney for
Jewell C. McNair

Robin L. Beardsley
Sirote & Permutt, P.C.
2311 Highland Avenue South
Post Office Box 55727
Birmingham, AL 35255-5727
rbeardsley@sirote.com
Attorney for
Jewell C. McNair

Done this 28th day of April, 2006.

/s/ William N. Clark

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**No.:2:05-CR-00061-RBP-TMP**
JEWELL C. "CHRIS" MCNAIR, GRADY R. PUGH, JR., JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHTERTY [sic] ENGINEERING & ASSOCIATES, INC.	)	
Defendants.	)	

DEFENDANT'S RAST CONSTRUCTION, INC.'S MOTION FOR NEW TRIAL

(Filed Apr. 28, 2006)

Comes now the Defendant, Rast Construction, Inc. pursuant to Rule 33, Federal Rules of Criminal Procedure, and respectfully moves the Court for a New Trial in this cause as to all pertinent Counts of

the Second Superseding Indictment, separately and severally, on the following grounds, separately and severally, including those grounds raised by any Co-Defendant.

Rast Construction adopts and includes herein by reference, the same as if set forth in their entirety, each and every ground asserted in Daniel B. Rast's and Bobby J. Rast's Motion for New Trial.

DATED this 28th day of April, 2006.

Terry W. Gloor
Attorney for Defendant
Rast Construction, Inc.

OF COUNSEL:
800 Shades Creek Parkway, Ste. 335
Birmingham, AL 35209
205-870-4104 – office
205-870-4118 – Fax

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2006, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

William D. Dillon, Esquire
U.S. Department of Justice
Antitrust Division
Richard B. Russell Building
75 Spring Street, S.W., Suite 1176
Atlanta, GA 30303

Done this ___ day of _____, 2005.

/s/ **Terry W. Gloor**
OF COUNSEL

APPENDIX G-2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**2:05-CR-0544-LSC-TMP**
JACK W. SWANN, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.	)	
Defendants.	)	

BOBBY J. RAST'S MOTION FOR NEW TRIAL

Comes now the Defendant, Bobby J. Rast (hereinafter referred to as "Bobby Rast") and pursuant to Rule 33, Federal Rules of Criminal Procedure, and respectfully move the Court for a new trial as to Counts 51, 66 and 67 of the Second Superseding Indictment, separately and severally, on the following grounds, separately and severally, including those grounds raised by any Co-Defendant:

1. The Court erred in denying Defendant's Motion to Dismiss the Second Superseding Indictment.

2. The Court erred in denying Defendant's Motion to Strike Certain Portions of the Second Superseding Indictment.

3. The Court erred in denying Defendant's Motion for Juror Questionnaire in that well over a majority of the jury venire had heard or read something about the Defendant or the case. Further, there had been several prior trials relating to essentially the same issues and there had been extensive publicity regarding the case.

4. The Court erred in failing to permit the Defendant to question outside the presence of the jury all jurors on the venire who had read or heard something about the case, related cases or the Defendant.

5. The Court erred in denying Defendant's Motion for a *James* hearing.

6. The Court erred in denying Defendant's Motion in Limine to Exclude Evidence of Other Alleged Crimes, Wrongs or Acts and in admitting such testimony, including, but not limited to, the testimony regarding alleged payments for work done and evidence regarding Harry Chandler and Don Ellis, and evidence regarding other alleged misconduct of the other Defendants not set forth in the indictment. While Defendant contends that such evidence was not admissible, any probative value was

outweighed by the prejudice against this Defendant under Rule 403, Federal Rules of Criminal Procedure.

7. The Court erred in denying Defendant's motion for mistrial.

8. The Court erred in denying Defendant's Motion for a Bill of Particulars.

9. The Court erred in allowing the Government to offer evidence regarding alleged payments for work done on behalf of defendant, Jewel C. "Chris" McNair, in that the admission of such evidence was overly prejudicial to defendant, Bobby Rast in violation of Rule 403, Federal Rules of Criminal Procedure. The trial judge erred in admitting such inflammatory, improper and prejudicial evidence.

10. The Court erred in overruling Defendant's objections made to questions asked by the Government to its own witnesses. (This ground will be supplemented upon completion of the transcript).

11. The Court erred in sustaining the Government's objections made to questions asked by the Defendant to the Government's witnesses. (This ground will be supplemented upon completion of the transcript).

12. The Court erred in overruling Defendant's objections made to exhibits offered by the Government.

13. The Court erred in denying Defendant's Motion for Judgment of Acquittal made at the close of the Government's case.

14. The Court erred in denying Defendant's Motion for Judgment of Acquittal made at the close of all the evidence.

15. The trial Court erred in refusing to give Defendant's written requested instructions on reasonable doubt (requested instruction #'s 2 and 3) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that a reasonable doubt can arise from the evidence, part of the evidence and lack of evidence and would have made clear the proper standard. Further, the instructions explained that a defendant may rely on evidence brought on cross-examination of Government witnesses, and that they should not decide the case based upon mere suspicion, possibility or guesswork. The refusal of such charges denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States. The Defendant's defense was that there was *no evidence* of any corrupt intent, and that Defendant's only actions were done out of friendship.

16. The trial Court erred in refusing to give Defendant's written requested instructions regarding not showing prejudice against Defendant's attorney because of objections (requested instruction # 5) which was timely requested and objection made to its omission. The refusal of such charge denied the Defendant his right to due process and to a fair trial

in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

17. The trial Court erred in refusing to give Defendant his written requested instructions on Multiple Conspiracies (requested instruction #'s 11, 12, 13 and 14) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt the existence of the specific offense charged and not some other, for example that the Government must prove only the one overall conspiracy and that if they determined that there were several separate and independent conspiracies then they should find the Defendant not guilty. The refusal of such charges denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

18. The trial Court erred in refusing to give Defendant's written requested instructions on Conspiracy and on The Existence of an Agreement (requested instruction # 15) which was timely requested and objection made to its omission. The instruction would have had the effect of fully explaining to the jury that the Government had to prove beyond a reasonable doubt that there was a mutual understanding, i.e., an agreement, between two or more people to accomplish an unlawful act and the Defendant's knowing participation in that agreement. This instruction was important because the Government showed no more than that there may have been some

involvement of the defendant at one time or another in the work on Nila Swann's home. Also, the Government had to prove beyond a reasonable doubt that the Defendant had knowledge of the overall unlawful scheme. The refusal of such charges denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

19. The trial Court erred in refusing to give Defendant's written requested instruction on Conspiracy Membership(requested instruction #16)which was timely requested and objection made to its omission. The instruction would have had the effect of explaining to the jury that the Government had to prove beyond a reasonable doubt that the Defendant with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in the conspiracy for the purpose of furthering the illegal undertaking. The refusal of such charge denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

20. The trial Court erred in refusing to give Defendant's written requested instructions on Good Faith Defense to Conspiracy and Bribery (requested instructions #'s 25-28 and 30) which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendant acted with the

specific intent to accomplish an unlawful act. Furthermore, the instructions explained that good faith is a complete defense to both the conspiracy and the bribery charges because good faith is inconsistent with knowingly and willfully conspiring to accomplish an unlawful plan, or corrupt intent. The Defendant's defense was that anything that was done for Nila Swann's house was done out of good faith and friendship. The refusal of such charges denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

21. The trial Court erred in refusing to give Defendant's written requested instruction on Bribery concerning a program receiving federal funds (requested instruction #'s 32 and 38) which was timely requested and objection made to its omission. The instruction would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendant gave something of value to Defendant Swann with the specific corrupt intent of obtaining a specific quid pro quo, i.e.: to improperly cause Defendant Swann to commit a specific act in favor of Defendant or with the specific corrupt intent of illegally rewarding Swann for having committed an act. The refusal of such charge denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States. Further, the instructions would have had the effect of explaining to the jury that the government had to

prove beyond a reasonable doubt that the Defendants had a corrupt purpose in providing gifts or services to Jack Swann. Also, the instructions would have made it clear that the law does not forbid friendship between a citizen and a public official or for a citizen to give a public official a gift or service arising from that friendship or to even foster a sense of good will even with a generalized hope of some ultimate benefit to the donor. The refusal of such charges denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

22. The trial Court erred in refusing to give Defendant's written requested instructions #'s 34, 36, 38 and 40 which were timely requested and objection made to their omission. The instructions would have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendant had a specific corrupt intent to give the specific things alleged to Jack Swann in exchange for some specific business or a specific business transaction connected with the JCESD sewer construction program. The refusal of such charges denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States. The instructions would also have had the effect of explaining to the jury that the government had to prove beyond a reasonable doubt that the Defendant did not give or provide the things of value alleged in the Second Superseding Indictment to Jack Swann because of

their friendship, but to corruptly influence or reward Swann in connection with specific business, specific transactions, or a series of specific transactions connected with the JCESD sewer construction program. The refusal of such charges denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

23. The trial Court erred in refusing to give Defendant's written requested instructions #42 which was timely requested and objection made to its omission. The instruction would have had the effect of explaining to the jury that the Defendant has a constitutional right not to testify. The refusal of such charge denied the Defendant his right to due process, the right to remain silent, and to a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

24. The Court erred in denying Defendant's written requested instructions regarding the requirement for a specific *quid pro quo* and overruling his objection to the Court's oral charge in ruling that in a bribery case the only *quid pro quo* required is proof of the intent to corruptly influence or be influenced as to some one or more acts or series of acts, not some specifically defined act or acts which must be alleged. The refusal of Defendant's charges on quid pro quo and the Court's oral instruction denied the Defendant his right to due process and to a fair trial in violation of the Fifth and Sixth Amendments to the

Constitution of the United States, in that there was no evidence of any quid pro quo whatsoever.

25. The trial Court erred in permitting the Government unfettered use of alleged Rule 404(b) evidence of the various defendants' alleged similar acts. The admission of such evidence was highly prejudicial to Defendant and denied his right to due process and to a fair trial under the Fifth and Sixth Amendments to the United States Constitution. Under Rule 403, Federal Rules of Evidence any relevance was clearly outweighed by the prejudice against this Defendant. The admission of such evidence only served to confuse the jury with extraneous and irrelevant information.

26. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt as to the guilt of the Defendant.

27. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offenses charged in Counts 51, 66 and 67 of the Second Superseding Indictment.

28. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of any violation of any law of the United States.

29. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant did not act in good faith.

30. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that any alleged gift or service provided by Defendant was not provided out of friendship.

31. The evidence presented by the Government was insufficient to prove beyond a reasonable doubt facts establishing federal jurisdiction. The first paragraph of the indictment simply alleges that "Jefferson County received more than $10,000 in assistance from the United States government each year relevant to this indictment." There is no further explanation regarding what type of "assistance" this was, or where the money was routed. Not just any funds from the federal government can qualify as "benefits" under 18 U.S.C. § 666(b). *See Fischer v. United States*, 529 U.S. 667 (2000). "Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Fischer*, 529 U.S. at 681. The indictment fails to allege and there was no evidence that any federal funds were corruptly administered, were in any danger of being corruptly administered, or even could have been corruptly administered. Further, there was

no allegation or proof that any of the alleged federal funds were in any way connected to the matters charged in the indictment.

32. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant had any intent to corruptly influence or reward Jack Swann in the performance or execution of "some one or more acts or series of acts" of any kind pertaining to Jefferson County.

33. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant sought to obtain any form of benefit from Jack Swann at any time within the time frame of the Second Superceding Indictment.

34. Insufficient evidence was presented from which a reasonable jury could be convinced beyond a reasonable doubt that any conspiracy occurred as alleged in Count 51 of the Second Superseding Indictment.

35. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant acted with the requisite criminal intent as to Counts 51, 66 and 67 of the Second Superseding Indictment.

36. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant

acted "knowingly" and "willfully" with regard to Counts 51, 66 and 67 of the Second Superseding Indictment.

37. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense(s) charged in Counts 51, 66 and 67 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that work and services provided for Nila Swann's house were not merely provided to Nila Swann as a gift, or out of goodwill or because of Defendant's friendship with both Nila Swann and Jack Swann.

38. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the "overt acts" alleged to have been committed by any defendant were acts done in the furtherance of a conspiracy, or that they were done with the necessary corrupt intent.

39. As to Counts 66 and 67 of the Second Superseding Indictment, there was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant knowingly

and willfully had any corrupt intent whatsoever, or that any alleged gift or service was done or provided knowingly and willfully with any corrupt intent to influence or to reward a county official.

40. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that there was insufficient evidence that the Defendant came to any agreement or mutual understanding with anyone to accomplish any unlawful plan. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant agreed or conspired with any other person for any illegal purpose.

41. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant knowingly and willfully intended to voluntarily join in and participate in the conspiracy attempted to be alleged in Count 51 of the Second Superseding Indictment. Further, there was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was a conspiracy in progress at the time

42. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51

of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the purpose of the alleged conspiracy was for the alleged defendants "to corruptly give, offer, and agree to give things of value to any person with the intent to influence and reward an agent of county government."

43. There was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that the alleged conspiracy was carried out as described in the "Manner and Means of the Conspiracy" section, paragraphs 6, 7 and 8 of the Second Superseding Indictment. The acts described in said paragraphs are acts which if proven beyond a reasonable doubt would constitute separate completed acts, and not the manner and means by which the conspiracy, the "agreement", was carried out. There was no allegation in the indictment and no evidence offered by the Government as to the manner and means by which the defendants allegedly got together, made arrangements, or in any way conspired to do anything. There was no allegation and no proof that any alleged work by this Defendant or any other Defendant was done as part of any conspiracy.

44. There was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was in fact any conspiracy as alleged in Count 51 of the Second Superseding Indictment in that the circumstantial evidence presented was inconsistent with an obvious and

reasonable interpretation of the evidence and no more than guesswork, speculation, or possibility supported the jury's finding of guilt.

45. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant conspired with anyone to "corruptly offer, give, and agree to give anything of value" to Jack Swann as alleged in paragraphs 3 and 5 in the Second Superseding Indictment. There was no evidence whatsoever that Defendant knowingly and willfully joined any conspiracy.

46. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant conspired with another person or that he was aided and abetted by any other person to cause Swann to influence Jefferson County and the JCESD or to reward Swann in any manner.

47. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant knowingly, willfully and voluntarily participated in any conspiracy with any person as part of a single plan that ran from "September 1998 and continuing at least through November of 2003."

48. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that a single plan or conspiracy existed. The only evidence was that there were different acts committed by different defendants at *Nila* Swann's house at various times over a two year period, but with no evidence whatsoever of any object or intent to influence or reward Jack Swann in any way connected to such Defendant's acts.

49. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant conspired with Defendant Swami or any other defendant for Swami to corruptly solicit and accept

things of value as alleged in Count 51, paragraph 4 of the "Objects of the Conspiracy."

50. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant conspired with the other defendants to "corruptly give, offer and agree to give things of value to Defendant Swann" as alleged in paragraph 5 of the "Objects of the Conspiracy."

51. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant had a general understanding of an unlawful purpose of "the plan" or that he "knowingly and willfully joined in that plan on one occasion."

52. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant or any other defendant knowingly and willfully committed

an overt act in an effort to carry out or accomplish some object of the alleged conspiracy.

53. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant knowingly and willfully associated with the alleged crime and that he knowingly and willfully participated in it.

54. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 51 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant was a knowing and willful participant in the alleged conspiracy.

55. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 66 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Bobby Rast knowingly and willfully gave to Defendant Jack Swann painting

work provided by Kimro Painting with a corrupt intent to influence and reward Swann in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more. The evidence was that the house where the work was done was owned by Nila Swann, that Jack Swann had no knowledge of it, that Nila Swann originally contracted with Kimro to have the work done, that Nila Swann paid approximately $16,000 for work done, and that after she refused to pay more, Derrick Houston, an employee of Pennington-Rast advised to send the bill where it was paid by Hailey-Rast – a separate entity.

56. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 66 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant knowingly, willfully and corruptly intended to influence or reward Jack Swann in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction or series of transactions involved something of value of $5000.00 or more.

57. There was a material variance in the evidence presented from the allegations of Count 66 as set forth in paragraph 56 above.

58. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 67 of the Second Superseding Indictment. The alleged service or gift described in Count 67 was alleged to have been plumbing provided by Brown Mechanical. However, the evidence showed that the plumbing work was done at Nila Swann's house, that Jack Swann was not aware of who paid for the work, that Nila Swann initially paid for the work done until she became dissatisfied and refused to pay, that Bobby Rast out of a sense of responsibility for having recommended Brown Mechanical agreed to pay the balance, and that the expense was actually paid by Hailey-Rast, a separate entity.

59. There was a material variance from the evidence presented and the allegations of Count 67.

60. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant was guilty of the offense charged in Count 67 of the Second Superseding Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendants knowingly and willfully gave or provided to Defendant Jack Swann plumbing provided by Brown Mechanical with a corrupt intent to influence and reward Jack Swann in connection with a transaction or series of transactions with Jefferson County, Alabama which transaction

or series of transactions involved something of value of $5000.00 or more.

61. Insufficient evidence was presented by the Government as to each count of the indictment in that the Government wholly failed to prove any specific *quid pro quo* for the alleged gifts and services of which a reasonable jury could be convinced beyond a reasonable doubt. There was no proof of any *quid pro quo*, and no proof of any specific intent to give something of value in exchange for a specific act.

62. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that any gift or services provided by Bobby Rast was done with a corrupt intent as charged in Counts 66 and 67.

63. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that there was any quid pro quo to be provided in connection with the alleged bribes charged in Counts 66 and 67.

64. Insufficient evidence was presented from which a reasonable jury could be convinced beyond a reasonable doubt that Jack Swann had any ability to corruptly influence any action in which Defendant had an interest, or to reward Defendant, or that he did corruptly influence any action in favor of Defendant or reward Defendant.

65. There was insufficient evidence from which a reasonable jury could be convinced beyond a

reasonable doubt that Defendant Bobby Rast was aided and abetted by Danny Rast or Rast Construction or Rast Construction as alleged in Counts 66 and 67 of the indictment.

66. The Court erred in denying Defendant's Motion to Dismiss in that the indictment and each count thereof fails to advise the Defendant of what it is he is alleged to have done other than in general terms. The conspiracy Count 51 is clearly insufficient to protect Defendant from a further prosecution for the same offense. The indictment makes only vague allegations of a conspiracy in Count 51 and then list "Overt Acts" which are not even alleged in the indictment to have been done in furtherance of the conspiracy – merely a list of alleged acts.

Dated this 10th day of October, 2006.

William N. Clark
Attorney for Defendant
Bobby Rast

OF COUNSEL:
REDDEN, MILLS & CLARK
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457 – office
(205) 322-8481 – fax

CERTIFICATE OF SERVICE

I hereby certify that on [sic] mailed a copy of the foregoing by United States Mail, postage prepaid and properly addressed:

Alice H. Martin, Esq.
United States Attorney's Office
1801 4th Avenue N.,
Birmingham, Alabama 35203

William Dillon, Esq.
United States Attorney's Office
Richard B. Russell Building
75 Spring Street, S.W.,
Ste. 1176
Atlanta, GA 30303

J. Stephen Salter, Esq.
2107 Fifth Avenue, North
Birmingham, Alabama 35203

David McKnight, Esq.
2008 3rd Avenue South
Birmingham, AL 35226

Michael L. Brown, Esq.
Alston Bird, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

Katie Loggins Vreeland, Esq.
AmSouth Harbert Plaza,
Suite 2400
1901 6th Avenue North
Birmingham, AL 35203

Fournier J. Gale, III, Esq.
Maynard, Cooper & Gale PC
AmSouth Harbert Plaza,
Suite 2400
1901 6th Avenue North
Birmingham, AL 35203

Done this 10th day of October, 2006.

OF COUNSEL

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**No.:2:05-CR-0544-LSC-TMP**
JACK W. SWANN, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST,DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.	)	
Defendants.	)	

DEFENDANT'S RAST CONSTRUCTION, INC.'S MOTION FOR NEW TRIAL

(Filed Oct. 10, 2006)

Comes now the Defendant, Rast Construction, Inc. pursuant to the provisions of Rule 33, Federal Rules of Criminal Procedure, and respectfully moves his Honorable Court for a New Trial as to Courts 51, 66, and 67 of the Second Superseding Indictment,

both separately and severally, and as grounds therefore Rast Construction, Inc. adopts and includes herein by reference, the same as if set forth in their entirety, each and every ground asserted in Bobby J. Rast's Motion for New Trial and any other grounds raised by any Co-Defendant.

DATED this 10th day of October, 2006.

Terry W. Gloor
Attorney for Defendant
Rast Construction, Inc.

OF COUNSEL:
100 Williamsburg Office Park, Suite 100
Birmingham, AL 35216
205-822-1223 – office
205-822-1216 – Fax

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2006, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

William D. Dillon, Esquire
U.S. Department of Justice
Antitrust Division
Richard B. Russell Building
75 Spring Street, S.W., Suite 1176
Atlanta, GA 30303

Done this ___ day of _____, 2006.

/s/ **Terry W. Gloor**
OF COUNSEL

APPENDIX H-1 (MOSLEY) VOLUME I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. JEWELL C. "CHRIS" MCNAIR, GRADY R. "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC., Defendants.	Case No. CR05-PT-61-S Birmingham, Alabama April 6, 2006 8:45 a.m.

TRANSCRIPT OF TRIAL
HELD BEFORE THE
HONORABLE ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE,
and a Jury

* * *

[133] Q And the last in this group is 1-T which is December – 12-22-2000; is that right?

A Yes, sir.

Q So you were out there on July to December?

A Yes, sir.

Q During that time, what was accomplished? What could you look at when you finished and say, well, this is what I did?

A I did all of the – when I got there this rough sheet rock was up.

Q You're talking about inside?

A Yes.

Q And then when I left, it looked like it was finished?

A Okay.

Q Was that primarily what you did inside?

A Yes, sir. I mean, I didn't do the painting or the electrical or plumbing. I did the tile work, the granite, the trim, and I supplied a lot of materials, too, on this job.

Q Now you also, when you left there, you went to another job, didn't you?

A Yes, sir. I have to keep jobs one after the other to keep going.

Q Tell the jury which job you went to work on.

A I don't know if it was directly right after this or real close, I went and built Mr. Bobby Rast's home.

Q You worked on Bobby Rast's house?

[134] A Yes, sir. I built his new home. Yes, sir.

Q And you were paid for doing that work?

A Yes, sir. In fact, they always say you'll remember where you were at 9/11. I was in the middle of that big old floor on 9/11.

Q And your concern when you got a check, Mr. Mosley, was whether the amount was right and your name was right and it was signed?

A That was my concern. If the amount was right and if the number matched what was written, and of course written out to me, and if it was signed. Yes, sir. That's my concern that the amount was right mainly.

Q And did you know at that time of the friendship between Bobby Rast and Mr. McNair and the friendship that had preceded between Bobby's father and Mr. McNair?

A Yes, sir. I had been to a couple, I guess, Christmas parties that Mr. Dougherty would have, and I would meet some of those people.

Q All right. And you were aware that Pat Dougherty and Bobby Rast were friends?

A Yes, sir.

Q Were you involved at the time the wall at Pat Dougherty's house broke and Bobby Rast sent somebody over there to fix it?

A Yes, sir. I helped Mr. Pat build his house back when it caved in. There was a big rain and that whole back wall fell [135] and the house liked to fell in and I went over there and fixed all of that. Yes, sir.

Q And Bobby sent people over there, too, didn't he?

A Yes. Bobby, they're friends, and he pitched in to help Mr. Pat out.

Q Well, is it true, Mr. Mosley, in this business that friends do help friends when they've got –

A Oh, yes, sir. That goes on all of the time. Yes, sir.

Q Now the last checks they showed you were January of 2002 and 1-U and 1-V?

A Yes, sir.

Q Let's put those up there. Now these are dated January of 2002; is that right?

A Yes, sir.

Q And the last check you had received for that was in December of 2000; is that right?

A Yes, sir.

Q And I'm not sure. Did you say you were not aware that Mr. McNair had retired in March of '01?

A No, sir. I live in Bibb County.

Q Could I see Government's Exhibit 21-F? Now, the prosecutor asked you about everything. As you look at that, there's a fence, and he was asking about the things on the other side of that fence, so to speak. I'm going to ask you about the things on this side of the fence. Were you aware

* * *

APPENDIX H-2 (BROCK) VOLUME III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. JEWELL C. "CHRIS" MCNAIR, GRADY R. "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC., Defendants.	Case No. CR05-PT-61-S Birmingham, Alabama April 10, 2006 8:00 a.m.

TRANSCRIPT OF TRIAL
HELD BEFORE THE
HONORABLE ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE,
and a Jury

* * *

[659] could send thank you notes.

Q And you may recall that that cruise you mentioned to Alaska was something that the Rasts gave to your family? To your parents?

A Yes.

Q In fact, you do know Bobby and Danny Rast?

A Yes.

Q And you remember their father, Holt?

A Yes, I do.

Q And you've known the Rast family for years?

A For a long time.

MS. BEARDSLEY: May I approach, Your Honor?

THE COURT: All right.

BY MS. BEARDSLEY:

Q I'm showing you what's been marked as Defendant's Exhibit 313.

A Yes.

Q Do you recognize this?

A Yes.

Q Is this a fair and accurate depiction of the image in the photograph?

A Yes, it is.

MS. BEARDSLEY: Your Honor, at this time, I move Defendant's Exhibit 313 into evidence.

MR. DILLON: No objection.

[660] THE COURT: Admitted.

BY MS. BEARDSLEY:

Q Kim, can you tell me what's in this picture?

A This is a picture of my father and Mr. Rast.

Q And do you know when this photograph was taken?

A Not exactly. It's been a long time ago.

Q So you would say that your father and Holt Rast have been friends for a long time?

A Yes, they have.

Q In fact, your whole family has spent time with the Rast family?

A Yes. On different occasions.

Q I think you told me that there was something different about Bobby and Danny Rast?

A Yes. You know, people would come by the studio and see dad and talk to him and they were all special people. But whenever Bobby and Danny came by, it was just like they were family, you know? Kind of like a brother you hadn't seen in a long time or something. So it was just a really special relationship that we had with them.

Q And you spent Christmas parties together?

A Christmas office parties and things like that.

Q And they came to the 50th wedding anniversary for your parents?

A They did.

[661] Q In fact, the Rasts drove to Huntsville to an honorarium for your father at Alabama A&M?

A I wasn't there but I heard about it.

Q And your dad took pictures of Holt Rast and his boys just a few weeks before he passed away?

A Right.

Q In fact, your father also photographed –

MR. DILLON: Objection. Relevance.

MS. BEARDSLEY: Your Honor, this goes directly to the relationship.

THE COURT: It's the same thing. Go ahead. Overruled.

BY MS. BEARDSLEY:

Q In fact, your father took some photographs at Holt Rast's funeral in 1998?

A Yes, he did.

Q You would agree with me that the Rast family and your family were longtime friends?

A Yes, they were.

MS. BEARDSLEY: That's all I have.

THE COURT: All right. Any other questions of anyone?

MR. SALTER: I have a few, Your Honor.

CROSS EXAMINATION

BY MR. SALTER:

* * *

APPENDIX H-3 (COLE) VOLUME III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. JEWELL C. "CHRIS" MCNAIR, GRADY R. "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC., Defendants.	Case No. CR05-PT-61-S Birmingham, Alabama April 10, 2006 8:00 a.m.

TRANSCRIPT OF TRIAL
HELD BEFORE THE
HONORABLE ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE,
and a Jury

* * *

[683] Q Have you socialized with Mr. and Mrs. Rast?

A Yes.

Q Have you been invited to any of their family functions?

THE COURT: I'm not sure where we're going.

MS. WILEY: I'm wrapping up, Your Honor. Give me a little leeway.

BY MS. WILEY:

Q Have you been invited to any of their family functions?

A Yes.

Q Have you taken trips with Mr. and Mrs. Rast?

A Yes.

Q And all of that time period, would you say it was two decades, 20 years?

A No. I met them in '87 and I think the last trip we took together was in '98.

Q In all of that time period, have you ever met Chris McNair?

A No.

MS. WILEY: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. CLARK:

Q Ms. Cole, you were asked by the government lawyer about when you first net Bobby and Sara and you said you lived in the same neighborhood. How far did you live from each other?

A I was on Starlake Drive and they were on Starlake Circle, [684] so we were sort of around the corner from each other.

Q And who lived there first?

A The Rasts did.

Q And after you got there, did they welcome you into the neighborhood?

A Their daughter babysat for my son but we actually had a mutual friend who sort of introduced us who started that Christmas caroling that year that we all kind of got to know each other.

Q And it was that year at the Christmas caroling that you all got to be friends?

A Correct.

Q And then that friendship grew and you continued to be friends?

A Yes.

Q Now, Ms. Cole, your husband is a law professor?

A That's correct.

Q And he and Bobby Rast got to be friends?

A Yes.

Q Now your husband is a law professor and Bobby knows how to fix things, is that true?

A That's true.

Q And you, from time to time, had problems at your house, didn't you?

A Yes.

[685] Q Well, do you recall having a fairly big problem with your drainage ditch?

A Yes, we did.

Q Do you remember about when that was?

A I don't. But what I do remember is our son was – I have a picture of our son on that big piece of equipment with Bob as he is working in the back yard.

Q Well, tell us what the problem was?

A Well, the first time –

MS. WILEY: Objection, Your Honor. Relevance.

THE COURT: Well, I assume the relevance is to show that he did a neighborly thing. I don't know. Is that it?

MR. CLARK: It's to show that he was helping this neighbor like he helped other friends.

MS. WILEY: Objection, Your Honor. There's never been any evidence that Mr. McNair was a neighbor of the Rasts.

MR. CLARK: There is evidence he was a friend.

THE COURT: Well, I'll let the jury give whatever weight they think it's entitled.

BY MR. CLARK:

Q All right. Go ahead.

A We had a drainage problem. I'm sure my husband could explain this better than I could. The water was not properly – we had a creek behind our house and it wasn't properly flowing into the creek. And I'm sure one night over dinner [686] when we were all talking, Bobby said, oh, I can help with that; and he did. He brought equipment over and worked on it and put a pipe in and put some dirt on top of it. Well, he fixed the problem.

Q Was it a big piece of heavy equipment that came out there?

A Yes. Because somebody had to crawl inside. I remember the person who had to crawl inside was a little person because they had to glue some stuff together in it. I don't know. I'm not real good at explaining drainage problems.

Q And did Bobby Rast, himself, work on that project?

A He was there to make sure everything went okay. But the job I remember is later – he also worked on another drainage problem we had in the backyard and he brought over a piece of heavy equipment that he drove himself because our son got up on it and rode with him for awhile that I took a picture of.

Q Do you recall a time when there was a snow storm?

A Oh, yes.

Q And –

A A tree fell across the road. I mean, Bob was the first one out there.

Q Who fixed it?

A Bob. He was the first one out there with his equipment and drug the big old pine tree out of the Starlake Drive so cars could go up and down the street.

[687] Q What's the name of the school? Is there a school near you?

A Yes, there is. Green Valley Elementary.

Q And do you know whether Bobby Rast and his company did any work at Green Valley?

A Worked on the playground.

Q Did he have equipment out there working on it?

A I didn't see it. But I know from the times I've been up to Green Valley, the comments were made that Mr. Rast helped with the playground.

Q Now, based on your knowledge, you've known Mr. Rast for many years. When he contacted you about the McNairs, was he dour or sour about, oh, I've got to do this or was he excited about making a gift to somebody?

A Well, I mean, Bob is always in a good mood. He was always very pleasant. He was a wonderful travel client because he was always very kind and gracious when he called.

Q All right.

A And it was sort of like he had been invited to something – and I want to say, I had like just a couple of days to put a gift certificate together. It was like men do, sort of last minute. I have this gift and I'm trying to decide That I want to do. But, no, he told me – they're very good travelers and they do love travel.

Q He asked you about a gift?

[688] A That's right.

Q And he told you that it was for the McNairs' retirement?

A Anniversary party.

Q Anniversary party. Anniversary party of their wedding?

A Yes.

Q And you suggested various options, did you not?

A Well, we probably talked it around a little bit, you know, saying what would be a good idea or what would be good for an elderly couple. And I probably said, well, let me work up some ideas for you and figure out. That would be a good idea.

Q And you ended up settling on this Alaskan cruise?

A Correct.

Q Were you provided information that I think Mrs. McNair had some medical problems?

A Yes.

Q What was that?

A She is a diabetic and she's insulin diabetic.

Q And was that something to take into consideration?

A Oh, absolutely. Whenever I'm booking anything like this, it's important to know the medical history because the cruise line wants to know the medical history. But the big thing with that is, most diabetics need to have first seating for dinner.

THE COURT: I don't think we need all the details.

[689] BY MR. CLARK:

Q And in your conversations with Mr. Rast and with Mrs. McNair, you wanted this to be a special trip for the McNairs?

A Well, yes.

Q Now, the documents that you were shown, let me look at than just a minute. Can you turn this on? Now this is a document that you prepared, Government's Exhibit 14-B?

A Correct.

Q And this was something that you sent to the Princess Cruise Line?

A Correct.

Q And it is very clear on that document that Bobby J. Rast, President of Rast Construction, is the person who is paying for that trip, is it not?

A Correct.

Q And it says that he had signed a form?

A Uh-huh.

Q And it reflects that it's for the 51st wedding anniversary gift for the McNairs?

A Correct.

Q And that is a document that you actually sent to the customer assistance cruise line?

A Correct.

Q And part of the reason for that was so that the cruise line could have arrangements to recognize the anniversary?

[690] A Correct.

Q While the McNairs were on that trip?

A Uh-huh.

Q They also showed you, I think, the fourth page of Government's Exhibit 14-B. What is that? Can you see that?

A Well, I think some of the markings on the one you're putting up here are a little different. Let me just make sure I have the correct one in front of me.

This is a credit card authorization form. When a third party is paying for travel, you have to have a picture of their driver's license as well as the front and back of their credit card –

Q Okay.

A – before I send it over to the cruise line.

Q And that's an authorization for Mr. Bobby Rast and it has a copy of his credit card that Rast Construction is to pay for this trip; is that right?

A Correct.

Q And you forwarded that to the –

A I faxed it.

Q Sent it to the cruise line?

A Yes.

Q When you first started talking to Bobby Rast about this, I believe in response to the government's questions you said that you thought the amount was going to be between three and [691] five thousand dollars?

A Yes.

Q But as you started getting into it, by the time you got to the end, the gift certificate escalated and it ended up with the amount that you testified about?

A Yes. It's not unusual for someone booking travel to initially add –

THE COURT: Just answer the question, please, ma'am.

THE WITNESS: Yes, sir.

BY MR. CLARK:

Q And it is true, it's not unusual that as things get started it may go up a little bit?

A Well, he changed from –

THE COURT: Well, the question was, is it not unusual?

THE WITNESS: It's not unusual.

THE COURT: All right.

BY MR. CLARK:

Q All right. Let me clear up one thing. The prosecutor asked you if you knew Sara Rast and you said that she was your very old and dear friend. You didn't mean that she's very old, did you?

A No. We've known each other almost 20 years.

Q All right. But you and Sara and Bobby and your husband are very good friends?

[692] A Yes.

Q Now, you were asked about the date of this cruise in September of 2001. Were you aware, did you know, Ms. Cole, that Chris McNair had retired from Jefferson County in March of 2001?

A I didn't know when he retired but I thought he was retired when this was purchased.

Q Okay. Ms. Cole, having known Bobby Rast as long as you have and having observed him, would you say he's one of the most generous people you've ever known?

A Oh, absolutely.

MR. CLARK: I think that's all.

THE COURT: Any other questions?

MS. WILEY: Just briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. WILEY:

Q Ms. Cole, you said Mr. Rast helped you with a drainage problem behind your house?

A Yes.

Q Do you do any sewer rehabilitation work for Jefferson County?

A No.

Q Does your husband do any sewer rehabilitation work for Jefferson County?

A No.

* * *

APPENDIX H-4 (CHANDLER) VOLUME V

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	Case No. CR05-PT-61-S
Plaintiff,	Birmingham, Alabama
VS.	April 12, 2006
JEWELL C. "CHRIS" MCNAIR, GRADY R. "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.,	8:30 a.m.
Defendants.	

* * *

TRANSCRIPT OF TRIAL
HELD BEFORE THE HONORABLE
ROBERT B. PROPST SENIOR UNITED STATES
DISTRICT JUDGE, and a Jury

* * *

[1071] A Yes.

Q There was no favoritism applied in connection with that Product Review Committee, was there?

A Talking about Jefferson County?

Q Yes. Jefferson County.

A I don't think so.

Q All right. And you were shown an exhibit by Mr. Brown that outlines the Product Review Committee and the change in the Product Review Committee, do you recall that?

A Yes.

Q That was – I think it's Pugh Exhibit 5-A. Do you have that? And Government's Exhibit 46-B?

A I've got 5-A and what was the other one? 46?

Q 46-B?

A B?

Q B. Yes.

A All right. I've got it.

Q All right. Now just go back. 5-A is what?

A This was a letter prepared, a memorandum prepared by Ron Wilson to Edwin Strickland, county attorney, Charlie Wagner, assistant county attorney, with respect to the cured-in-place CIPP prequalification; and a list of contractors who were to be sent a notice of the pending meeting.

Q All right. That followed what is Government's Exhibit – preceded 46-B which was a letter that was sent out announcing [1072] this meeting that you were asked about; is that correct?

A I don't recall the order. But, yes, it's the letter.

Q Now, the letter 46-B said something on Page 2 about presentations will be limited to ten minutes each?

A Yes.

Q Do you see that?

A Yes.

Q And Mr. Dillon asked you, well, that means that contractors are going to only have ten minutes to spend with Mr. Swann. Do you remember that question?

A I think so.

Q Well, look at Pugh 5-C. Do you see that? That's the memo that you did November 10, '99. Here it is. Now that meeting did occur and it was

announced by the letter that's Government's Exhibit 46-B; is that right?

A That's correct.

Q And Pugh 5-C are some sort of minutes or the report of what happened at that meeting?

A Just a summary.

Q And no written comments had been received?

A That's correct.

Q And that was something you had asked for, if they wanted to make them?

A Yes.

Q And only one request to speak had been received and that [1073] person was permitted to speak?

A That's correct.

Q And, as far as you know, did he get to say what he wanted to say?

A As far as I know, he did.

Q And were you at that meeting?

A I was.

Q And, to your knowledge, was there any mistreatment of any of the contractors who were there?

A No.

Q Anybody denied any opportunity to participate, if they wanted to?

A No.

Q Now, you were asked about emergency contracts and emergency work. Rast Construction had been doing emergency work long before this consent decree, had it not?

A Yes.

Q And when the consent decree – and, by the way, the letters were used, EPA. That's the Environmental Protection Agency?

A That's correct.

Q Is that who was the governmental agency that was involved with the consent decree?

A And the Department of Justice.

Q All right. But the Environmental Protection Agency was [1074] the agency that was following up with the consent decree to see that things were done, isn't that true?

A Yes, sir.

Q And you all understood that the EPA expected you all to fix something now, not wait two months, six months, a year, to do it, if you had sewage flowing or something that was an emergency?

A There were provisions in the consent decree to address those types of situations. Other work was to be done on a schedule.

Q And you took that seriously, didn't you?

A We did.

Q And you would expect that contractors who had agreed to do these sorts of things to be on call, as they say, 24-7, twenty-four hours a day and seven days a week?

A Yes, sir.

Q And based on your experience, Rast Construction always responded, did they not?

A They did.

Q And they did the work well?

A They did.

Q I think you were asked about W.L. Hailey and Rast Construction. You knew, did you not, that W.L. Hailey and Rast Construction and their joint venture went back to the mid '70s?

[1075] A Yes.

Q That was not something created just for this consent decree?

A Yes.

Q Now, with regard to W.L. Hailey, as it relates to the consent decree and the rehab work, W.L. Hailley had the franchise to do the liner work?

A That's correct.

Q And they had it with Cure-Line?

A That's correct.

Q And Rast Construction's expertise was in open-cut?

A That's correct.

Q Tell the jury what that means.

A It's going to locate utilities and do all preparatory work, and then with the machinery equipment, backhoes, and so forth, you're going to dig open the ground and replace the sewer line for the new sewer line.

Q Let me ask you if you would look at Government's Exhibit 32. Do you have that?

A Yes, I do.

Q And look at, I believe it's 32-C and 32-F.

MR. GLOOR: D.

BY MR. CLARK:

Q 32-D and F. I'm sorry. Let's look at 32-D first.

A Okay.

* * *

[1082] A That's correct.

Q And I asked you earlier whether you could tell whether that was where part of the reason for the modification, you were going from open-cut to tunneling, does this help you know?

A Yes. That's apparently what was being done.

Q And what that reflects is the decreases to the contract, taking off the footage that was going to have to be done in an open-cut and replacing it with footage that would be done with the tunneling; is that right?

A That's what it appears, yes.

Q All right. Mr. Chandler, you testified in response to the government's questions earlier that you had pled guilty to conspiracy?

A That's right.

Q That conspiracy that you pled guilty to did not involve Bobby Rast, Danny Rast, or Rast Construction, did it?

A No, sir.

Q Now, let me ask you about this trip that you took to Finland. You mentioned same organization that it was related to. Was that either the Southeast or the National Trenchless Society or something of that sort?

A Yes. That was part – that was associated with the National Trenchless – the Southeastern Society of Trenchless Technology, which is a branch of the National Society. But it [1083] also was a joint effort with Vanderbilt University and several other universities, Arizona State, and I think the university up in Canada.

We actually met in England first for a couple of days session with researchers over in England, that's where the cured-in-place products initiated from. We had roundtable discussions. My part was practical experience in the trenchless technology. Professors were more interested in the theoretical issues.

Q And this group that went was intended to be, and was, a cross section of people from academics, professors, it was to be representatives from counties like you?

A That's correct.

Q As well as others. Who else?

A Well, there were some engineering firms.

Q All right.

A So you had the engineering community and you had the public works sector and then you had the researchers, professors.

Q And the trenchless – what is the trenchless society interested in?

A Well, they're interested in the advancement of doing a lot of rehabilitation without the impedances associated with conventional open and cut construction where we ploy the use of cured-in-place liners, use of tunnel boring machines, and [1084] directional drilling, all an element of minimizing disruption to the masses of people during the rehabilitation program.

Q And part of that interest is if you have to do an open-cut and there's a problem in a neighborhood, you have to cut open somebody's street?

A That's correct.

Q Or the yard or whatever?

A Yes.

Q And this group, you were aware, were you not, that Bobby Rast was active in that trenchless society?

A Yes.

Q And you were aware, also, that European countries were ahead of the United States in developing that technology?

A That's correct.

Q Now, you were scheduled to go on that trip and to deliver a paper or a presentation in Birmingham, England, were you not?

A That's correct.

Q And that was scheduled before you made this request of Bobby Rast for some money; isn't that true?

A That's correct.

THE COURT: Did you request that the amount be paid in cash?

THE WITNESS: No, sir.

BY MR. CLARK:

[1085] Q Did you request it be paid in check?

A No.

Q But Mr. Rast knew that you were going on that trip and he knew you were going to deliver – or scheduled to deliver a paper?

A That's correct.

Q Did you know Mr. Tom Isley?

A I did.

Q And was Mr. Isley an officer or head of that organization?

A He was one of the officers of the Trenchless Technologies, yes.

Q And you knew that Bobby Rast and Mr. Isley had worked together or were friends?

A I knew that they had worked together in years past. Tom used to be a design engineer and he's

a professor involving a lot of the technology advancements.

Q At the time, was he a professor of engineering at Purdue University?

A At the time of the trip, he was not. But he had been in the past.

Q And he was also a professor at Louisiana Tech?

A Yes.

Q So you were scheduled to be a somewhat important part of this trip, as a speaker?

[1086] A In some ways I can say I was an integral part, yes.

Q All right. You mentioned to Bobby Rast that you weren't sure you could go unless you had some additional expense money, is that true?

MR. DILLON: Objection. Facts not in evidence, Your Honor. I would ask that he ask the witness what it is he said.

MR. CLARK: Cross examination, Your Honor.

THE COURT: What was the question? Read me the question, please, ma'am.

THE COURT REPORTER: Okay. Question: "You mentioned to Bobby Rast that you weren't sure

you could go unless you had some additional expense money; is that right?"

THE COURT: Did you say that to him?

THE WITNESS: I don't recall saying that.

BY MR. CLARK:

Q Well, you do recall telling him that you needed some additional money in order to go on the trip, don't you?

A I knew – well, I believe what I asked was that I didn't think that the reimbursement allowance from Vanderbilt and the National Science Foundation would cover all of my expenses and would he be able to maybe offset some of that.

Q All right. And had you ever been to Europe?

A Never had.

Q And so, did you, at that time, did you say, Bobby – did [1087] you call him "Bobby"?

A I did.

Q You had known him for many years, hadn't you?

A I did.

Q Did you say, if you give me this money, I will help you out in the future?

A No.

Q Did he tell you or suggest to you that he was doing this so that you would help him out in the future?

A No, he didn't say that.

Q And he gave it to you because you asked – to be sure that you could go on this trip you were scheduled to go on, isn't that true? Isn't that correct?

A I don't know. I can't answer that the way you posed it.

Q All right. Well, you know that you asked for money?

A I did.

Q And he knew you were going on this trip?

A Right.

Q And he gave it to you?

A I was going to go on the trip regardless.

Q All right. But you told him that you needed the money and this preceded you're going on the trip; isn't that true?

A Yes.

Q And you were not asking for a bribe, were you?

A I didn't see it that way –

[1088] Q All right.

A – at the time.

Q Mr. Chandler, you have never been offered anything of any value and asked to do something in return, have you, by Bobby Rast, or Danny Rast, or Rast Construction?

A Not in any specific way.

Q Well, you haven't been asked and said I want you to do something for me in the future, have you?

A No. There was no direct correspondence to that, no.

Q All right. And, in fact, you have never been offered anything of value for any contracts in which you may have participated; isn't that true?

A For any contracts, no.

Q And you have not taken any money from any contractors or consultants as a reward for anything you did, isn' t that true?

A Not intentionally.

Q Well, do you recall being interviewed by Mr. Mayhall over here, and Ms. Bryant, on January 31st, 2005?

A Yes.

Q Do you recall telling them at the time that you had never taken anything from any county contractors or consultants in compensation for favors you did for them?

A That was my statement.

Q All right. And your recollection today is that Bobby Rast gave you $5,000 on that occasion; is that right?

[1089] A That's correct.

Q You don't recall that he gave you $2,500?

A There was $5,000 to be split with Don Ellis, that makes $2,500.

Q All right. So he gave you $2,500?

A He gave me $5,000.

Q Well, did you keep $2,500?

A I kept $2,500.

Q And Don Ellis was also going on this trip, was he not?

A That's correct.

Q So you got $2,500 which you used for additional expenses on this trip to Finland and Birmingham, England where you gave a talk?

A That's correct.

Q After that trip, Bobby Rast never came to you and said, remember that money, you need to do something for me, did he?

A No, sir.

MR. CLARK: That's all.

CROSS EXAMINATION

BY MR. JONES:

Q Mr. Chandler, going back a little ways. The Product Review Committee. Do you recall getting copies of memos from Gary Locker about forming the Product Review Committee?

A Guy Locker?

Q Yes, I'm sorry. Guy Locker.

* * *

APPENDIX H-5 (JONES) VOLUME VI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	Case No. CR05-PT-61-S
Plaintiff,	Birmingham, Alabama
VS.	April 13, 2006
JEWELL C. "CHRIS" MCNAIR, GRADY R. "ROLAND" PUGH, JOSEPH E. "EDDIE" YESSICK, ROLAND PUGH CONSTRUCTION, INC., BOBBY J. RAST, DANIEL B. "DANNY" RAST, RAST CONSTRUCTION, INC., FLOYD W. "PAT" DOUGHERTY, and F.W. DOUGHERTY ENGINEERING & ASSOCIATES, INC.,	8:30 a.m.
Defendants.	

* * *

TRANSCRIPT OF TRIAL
HELD BEFORE THE HONORABLE
ROBERT B. PROPST SENIOR UNITED STATES
DISTRICT JUDGE, and a Jury

* * *

[1285] A Yes, sir.

Q Did you have occasion to observe Mr. Holt Rast on a regular basis when you were employed?

A Yes, sir, every day.

Q And did you observe any relationship between Mr. Rast, Mr. Holt Rast and Mr. Chris McNair?

A Yes, sir.

Q And that friendship relationship did you observe?

A I believe they were very good friends just from a couple of things that I've seen over the years.

Q Did they go to lunch often?

A Pretty often, yes.

Q Did they communicate regularly on the phone?

A I believe so.

Q And in Mr. Rast's last years and last months, I believe he past away in November of '98?

A Yes, sir.

Q And was he in fact in declining health for a number of months?

A Yes.

Q Was there a time in either October, the month before he died or during the month, where Mr. McNair came to the Rast Construction?

A Yes, sir.

Q . And what did you observe when he came?

[1286] A He came and took some photographs of Mr. Rast and then some photographs of Mr. Rast with Bob, some with Danny, some with Chuck, the older brother.

Q All right. I'll show you what's been marked as Defendant's Exhibits 105, 107, 106, and 102, and ask you if you recognize those photographs?

A I do.

Q And are they at the location of Rast Construction?

A Yes, sir.

MR. GLOOR: Your Honor, we'd so offer.

MR. DILLON: No objection.

THE COURT: Admitted.

BY MR. GLOOR:

Q And Donna, what is this a photograph of, please, ma'am?

A That's a photograph of Mr. Rast and Bob.

Q And who took that photograph?

A Chris McNair.

Q And this photograph was made either the same month or the month before Mr. Rast past away?

A Yes, it was very soon. Right close to that time.

Q All right. How about this photograph?

A That's Mr. Rast and Danny.

Q Was that taken at the same time?

A Yes, sir, it was.

Q All right. How about this photograph?

[1287] A That's a photograph of Mr. Rast.

Q Was that taken at the same time?

A Yes, sir.

Q By Mr. McNair?

A Yes.

Q Donna, what is this a photograph of?

A That's a photograph of Mr. Rast when he was All American at Alabama.

Q Is that, so to speak, on a wall of honor?

A Yes, it is.

Q Donna, let me show you some additional Defense Exhibits Numbers 103, 104, 111, and 108. Do you recognize those as being the location of Rast Construction?

A Yes, sir.

MR. GLOOR: Your Honor, defense would offer these exhibits.

THE COURT: No objection. Admitted.

BY MR. GLOOR:

Q What is Exhibit 103, please?

A It's a certificate where Mr. Rast was inducted into the Academy of Honor.

Q Is that the State Academy of Honor, State of Alabama.

A State of Alabama.

Q The Exhibit 104, please, ma'am, is that an honor that Mr. Rast received as the outstanding alumni of the University of [1288] Alabama Civil Engineering Department?

A Yes, sir, it is.

Q Is that dated 1995?

A Yes.

Q And Donna, let's look at Exhibit 108 and I'll ask you if you recognize that as a framed certificate of recognition to Rast Construction, Inc., and W.L. Hailey & Company, Inc. from the Jefferson County Department of Public Works dated September of 1984?

A Yes, sir.

Q Finally, Donna, Defense Exhibit 111. Is that in fact a plaque given to Rast Construction by Jefferson County Environmental Services Department in 1997 in recognition of outstanding performance?

A Yes, sir.

Q And the date of this instrument, this plaque, is 1997?

A Yes, sir.

Q Donna, the photographs that we showed you of Mr. Rast and his sons, would you please tell the ladies and gentlemen of the jury the first time you saw this photograph?

A It was after Mr. Rast had past away and Chris McNair brought them to the office framed and gave them to Bob and Danny and we hung them up in our office.

Q Was that after the funeral?

A Yes.

[1289] Q To your knowledge, was Rast Construction billed for those photographs and the framing?

A No.

Q Did you attend Mr. Rast's funeral?

A Yes, I did.

Q Did you observe Mr. and Mrs. McNair at the funeral?

A I noticed them at the graveside at the cemetery.

Q Would you please describe to the ladies and gentlemen Mr. McNair's appearance?

A It was very obvious to me that he was upset because I saw him crying when he was talking to Bob.

Q Donna, Mr. Dillon has mentioned a subpoena that Rast Construction honored to the Justice Department in Atlanta and I'll ask you if you were assigned, in part, to assemble all of those documents?

A Yes.

Q And how long did you work on that documentation?

A It was a good two months.

Q When that subpoena was received, who instructed you, please, ma'am, to assemble the documents?

A Bob Rast.

Q And did Bobby tell you to fully comply?

A Yes.

Q Did he tell you in fact to do whatever was necessary to comply to the fullest extent possible?

* * *

[1295] Q And how long has John been with the company?

A Since '95.

Q Is he married?

A Yes.

Q Does he have children?

A Yes.

Q How many?

A Three.

Q Donna, in your work at Rast Construction, have you observed Bobby and Danny in their practices of charitable giving?

A Yes.

Q Would you describe for the ladies and gentlemen what you have observed with their charitable giving?

A Bob and Danny and Mr. Rast, when he was alive, are probably the most generous people I know.

They have helped me send my children through college, as well as several of our other employees.

We have three scholarships that we fund. We fund a scholarship at the Big Oak Ranch, $10,000 a year. We have an ACC scholarship that we fund for the engineering school. And then Bob, Danny, and their brother Chuck, personally fund a scholarship at the University of Alabama Engineering Department. Any time that anybody has ever asked for anything, I've never known them to say no, whether it's an [1296] individual or a church or a community.

When we have storms and Hoover or Homewood would get hurt bad, we would always pick debris up for them or let them bring debris on our property. We've done a lot of work at Homewood Church of Christ, St. Peters Church, I believe. And we worked on a playground. We had kids work – young guys like John Wanhatalo worked on the Habitat for Humanity house.

I know they personally helped John Wanhatalo buy some property to build a house here so that his wife would be happy here and not want to move back home with her family in New York. And there's just too many to name because they are very generous people.

Q How about an employee named Scott Champion?

A I can't tell you the number of times – Bob kind of chewed me out when I told him I would wash

my hands of this particular person. But he's a young guy, he's had a hard life, we always helped his dad. His dad worked for us before he did. But he has come to Bob and Danny and Mr. Rast as long as I can remember and needed bailing out of every kind of financial situation he could get himself into and they never told him no.

Q All right. Donna, let me go back just a moment on the amended tax returns that we talked about earlier.

A Yes, sir.

Q In fact, did Hailey-Rast, the joint venture, file an [1297] amended tax return?

A Yes, sir.

Q As well as Rast Construction, Incorporated?

A Yes, sir.

Q Both separate legal entities filed?

A Yes, sir.

Q For the years in question?

A Yes.

MR. GLOOR: Thank you, Your Honor.

THE COURT: Any other questions?

MR. CLARK: Yes, sir.

CROSS EXAMINATION

BY MR. CLARK:

Q Donna, you have been at Rast for 23 years you said?

A Yes, sir.

Q And you know when this consent decree came into being in '96?

A Yes, sir.

Q You knew that Rast Construction had done significant work with Jefferson County before 1996, don't you?

A Yes.

Q And you've met Chris McNair; is that right?

A Yes, sir.

Q And Rast Construction was doing business with Jefferson County, substantial amounts of business, before Chris McNair [1298] became the Commissioner?

A Ever since I've been there, I know.

Q And there has been some testimony about Bobby Rast and Jack Swann. You knew that they had been friends for many many years, did you not?

A Yes.

Q Now, let me ask you about the comment that you said that Bobby made about – what was it you said he said about?

A Something to the effect that we shouldn't have any or didn't need any invoices in the file with Mr. McNair's address or Jack Swann's. I'm not sure of the exact words.

Q And at that time, there was not any subpoena that had been issued to Rast Construction or Bobby Rast, was it?

A No, there wasn't.

Q And what Bobby said was a comment and not a directive, isn't that true?

A Yes.

Q He did not tell you to destroy or discard anything?

A No.

Q Who made that decision?

A I did.

Q After you did that, did you go back and tell Bob Rast you had done what you did?

A No.

Q Did you ever have any discussion with him about what you [1299] had done?

A No.

Q Did you tell Danny Rast what you had done?

A No.

Q Now, when you got the first subpoena – the first one that the government has presented here is Government's Exhibit 34-A, sometime in the fall of 2002. Isn't it true that Bobby Rast told you to comply fully with that subpoena?

A Yes.

Q Did he tell you to produce anything that was responsive to that subpoena?

A Yes.

Q Did he tell you in any way to withhold anything from that subpoena?

A No.

Q And the government has another subpoena, Government's Exhibit 34-B, which is later in the fall of 2002, did he tell you to withhold or hide anything?

A No.

Q And when you got those two subpoenas, did you tell Bob Rast that you had discarded those documents you had earlier discarded at that time?

A No.

Q Rast Construction received a subpoena in May 12th, 2003. Can we turn that machine on a

minute? That's a subpoena [1300] directed to Rast Construction; is that right?

A Yes, sir.

Q And dated May 12th?

A Yes, sir.

Q And did Mr. Rast, when you got that subpoena, tell you to comply fully –

A Yes.

Q – with the subpoena?

A Yes, sir, he did.

Q Did he tell you to withhold anything or discard anything?

A No, sir.

Q Now, the government showed you, I believe, two affidavits and one waiver of appearance, 35-A, B, and C. Let me show you 35-A. That's an affidavit about documents and that's dated June 23, 2003; is that right?

A Yes, sir.

Q And Government's Exhibit 35-B is another affidavit dated August 7th of 2003?

A Yes, sir.

Q And then the waiver of appearance, Government's Exhibit 35-C, is dated also June 23, 2003; is that right?

A Yes, sir.

Q Now, were you aware that at some point after you had first received a subpoena, that Mr. Mayhall – you had contact with Mr. Mayhall, the FBI agent who is sitting over here?

* * *

[1307] A It very well could have. I don't know personally.

MR. CLARK: That's all. Thank you.

CROSS EXAMINATION

BY MR. JONES:

Q Ms. Jones, I represent Mr. McNair. Do you recall at one point when Holt Rast and Bob drove up to Huntsville to attend a special recognition for Mr. McNair at Alabama A&M?

A Vaguely.

Q And would it be fair to say that anyone who had even a casual observation would see that Holt and Danny Rast and Bob Rast had a very close and special relationship?

A Oh, yes.

Q Mr. McNair could observe that pretty easy, isn't that right?

A I think so, yes.

Q Holt Rast died in the fall of 1998?

A Yes, sir.

Q And after Mr. Rast died, Holt Rast died, is it true that Mr. McNair continued to drop by the office from time to time?

A Oh, yes.

Q And that was at least initially to see how Bob and Dan were coping with their dad's death?

A Yes.

Q And even for a number of years after that, Mr. McNair would bring by baked goods of some type that Mrs. McNair would [1308] make?

A Oh, yes.

Q And that lasted pretty much up until the time that Mrs. McNair got in bad health and couldn't do it anymore; is that right?

A Yes.

MR. JONES: That's all I have. Thank you.

THE COURT: Any other questions?

MR. DILLON: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. DILLON:

Q Good afternoon, Ms. Jones.

A Good afternoon.

Q Jimmy Brooks has been the company's CPA for how long?

A Duval & Associates has been our CPA ever since I started, before I started there. Jimmy Brooks has probably done our work 20 years or more.

Q And is Jimmy Brooks a CPA?

A Yes, he is.

Q Does he do the company's taxes?

A Yes.

Q And when you guys told Jimmy Brooks about that $50,000 that the company had paid to Barry Mosley to work on the studio, he told you that it was not deductible as charity work, didn't he?

APPENDIX H-6 (HENDON) VOLUME I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006-OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

****

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[167] MADE THE STATEMENT THAT IF YOU HAD KNOWN THAT'S WHAT GOT YOU FIRED, YOU WOULD HAVE DONE IT SOONER?

A. YES, SIR.

Q. NOW, SHE IS NOT THE EASIEST PERSON IN THE WORLD TO GET ALONG WITH?

A. NO, SIR.

Q. IS THAT CORRECT? JUST ONE SECOND.

MR. MCKNIGHT: JUDGE, THAT'S ALL I HAVE.

THE COURT: YES.

MR. WISE: NO, SIR, YOUR HONOR.

THE COURT: PUGH CONSTRUCTION?

MR. BROWN: NO QUESTIONS.

THE COURT: BOBBY RAST, DANIEL RAST?

MR. CLARK: YES, SIR.

CROSS-EXAMINATION BY MR. CLARK.

Q. MR. HENDON, YOU KNOW THAT BOBBY RAST AND PAT DOUGHERTY AND JACK SWANN

HAVE BEEN FRIENDS FOR A LONG TIME, DON'T YOU?

A. YES, SIR.

Q. AND IN FACT, YOU ARE AWARE THAT BOBBY RAST HAD HELPED -- YOU TALKED ABOUT MR. DOUGHERTY'S HOUSE HAVING SOME STRUCTURAL PROBLEM. WAS THAT THE WATER PROBLEM THAT CAUSED PART OF THE WALL TO POUND IN?

A. YES, SIR.

Q. AND BOBBY RAST SENT SOMEBODY OUT TO HELP HIM WITH [168] THAT PROBLEM?

A. YES, SIR.

Q. AS FAR AS YOU KNOW HE DIDN'T CHARGE HIM FOR THAT, DID HE?

A. AS FAR AS I KNOW. I DON'T KNOW.

Q. AND BOBBY RAST AND RAST CONSTRUCTION HAS HELPED YOU FROM TIME TO TIME WITH A PROJECT YOU HAVE HAD?

A. YES, SIR.

Q. PERSONALLY?

A. YES, SIR.

Q. DIDN'T CHARGE YOU FOR THAT?

A. NO, SIR.

Q. AND YOU GOT ON THIS 25C, THIS DOCUMENT, THAT IN ADDITION TO THINGS THE GOVERNMENT POINTED OUT IT'S GOT SOME OF THESE PEOPLE WORKING AT THE RAST HOUSE; ISN'T THAT TRUE?

A. YES, SIR.

Q. AND THAT WAS – BOBBY RAST WAS BUILDING A HOUSE; IS THAT RIGHT?

A. YES, SIR.

Q. IN FACT, FOLKS WHO HAVE HEAVY EQUIPMENT AND OTHER THINGS, IT'S NOT UNCOMMON TO HELP EACH OTHER, IS IT?

A. I WOULDN'T KNOW.

Q. ALL RIGHT. WELL, LET ME ASK YOU THIS. YOU TESTIFIED ABOUT YOUR BEING – I THINK MR. SWANN'S LAWYER

* * *

APPENDIX H-7 (BAILEY) VOLUME I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006-OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

****

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[226] A. YES, SIR.

Q. AND DID PAT DOUGHERTY HELP HIM DO SOME OF THE WORK ON HIS HOUSE?

A. YES, SIR, HE SENT ME OUT.

Q. DID YOU DO SOME OF THE WORK?

A. YES, SIR, HE SENT ME OUT TO HELP HIM.

Q. AND WHILE YOU WERE WORKING ON THE RAST HOUSE, DID YOU HAVE SOME PROBLEM WITH YOUR TRUCK?

A. YES, SIR, YES, SIR.

Q. PROBLEM WITH YOUR CLUTCH?

A. YEAH, BURNT MY CLUTCH OUT.

Q. AND DID MR. RAST, BOBBY, OFFER, BECAUSE IT WAS ON THE JOB, PAY TO GET THAT FIXED?

A. YES, SIR, SURE DID.

Q. DID HE PAY FOR IT?

A. YES, SIR.

Q. NOW, YOU SAID THAT YOU HAVE KNOWN BOBBY AND DANNY AND THAT'S THE KIND OF PERSONS THEY ARE, THAT THEY ARE GENEROUS WITH THEIR TIME AND EQUIPMENT TRYING TO HELP OTHER PEOPLE, AREN'T THEY?

A. YES, SIR.

Q. IN FACT, WAS IT SOMETIME WHEN YOU THOUGHT ABOUT BUILDING A POOL AND BOBBY OFFERED TO SEND SOMEBODY OUT TO DIG THE POOL FOR YOU –

A. YES, SIR.

[227] Q. – AT NO COST?

A. SURE DID.

Q. AND THAT'S JUST THE KIND OF FOLKS THEY ARE; ISN'T THAT RIGHT?

A. YES, SIR.

MR. CLARK: THAT'S ALL.

THE COURT: RAST CONSTRUCTION INCORPORATED?

MR. GLOOR: NO, YOUR HONOR.

THE COURT: FLOYD W. PAT DOUGHERTY AND F.W. DOUGHERTY ENGINEERING ASSOCIATES, INCORPORATED.

CROSS EXAMINATION BY MR. SALTER:

Q. GOOD AFTERNOON, MR. BAILEY. WE HAVE MET BEFORE, HAVEN'T WE?

A. YES, SIR.

Q. SO WITH REGARD TO THE SWANN HOUSE, YOU WERE OUT THERE JUST ON THE FRONT END OF THE PROJECT TO SEE IF THE DRAWINGS AND PLANS THAT MS. NILA SWANN HAD MIGHT WORK AT ALL?

A. WELL, STARTED AND THEN THEY WOULD CALL ME EVERY NOW AND THEN THROUGH THE PROJECT IF THEY HAD A PROBLEM.

Q. LIKE ONE TIME SHE WAS WANTING TO CUT OUT A SECTION OF ONE OF THE TRUSTS?

A. YES, SIR. MOVE A DOOR AND IT WAS GOING TO MESS UP THE TRUSSES, YES, SIR.

Q. AND YOU CONVINCED HER?

* * *

APPENDIX H-8 (JONES) VOLUME III AND IV

UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006-OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

****

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[VOLUME III] [692] JURORS KNEW OR DIDN'T KNOW A PARTICULAR WITNESS IN ANY WAY IN DECIDING HOW TO EVALUATE ANY OF THE WITNESSES' TESTIMONY OR THIS CASE AT ALL.

IF THERE IS ANYONE WHO CANNOT FOLLOW THAT INSTRUCTION, RAISE YOUR HAND, IF YOU CANNOT FOLLOW THAT INSTRUCTION? ALL RIGHT. LET THE RECORD REFLECT ALL THE JURORS HAVE INDICATED THEY CAN FOLLOW THE INSTRUCTION.

ANY OBJECTION TO THE INSTRUCTION?

MR. CLARK: NO, SIR.

MR. DILLON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. YOU CAN PROCEED WITH THE WITNESS.

DIRECT EXAMINATION BY MR. DILLON:

Q. MORNING, MS. JONES.

A. GOOD MORNING.

Q. WHERE DO YOU LIVE?

A. WARRIOR.

Q. AND WHERE DID YOU GO TO SCHOOL, MS. JONES?

A. GARDENDALE HIGH SCHOOL.

Q. AND WHAT IS IT THAT YOU DO FOR A LIVING?

A. I AM A BOOKKEEPER.

Q. AND DID YOU EVER WORK FOR RAST CONSTRUCTION?

A. YES, SIR, I DID.

Q. HOW LONG DID YOU WORK FOR RAST CONSTRUCTION, MS. JONES?

[693] A. TWENTY-TWO YEARS.

Q. AND WHAT WAS YOUR JOB AT RAST CONSTRUCTION?

A. I WAS A BOOKKEEPER.

Q. AND WHERE WAS YOUR OFFICE?

A. ON OXMOOR ROAD IN BIRMINGHAM.

Q. WAS IT AT THE CORPORATE HEADQUARTERS?

A. YES.

Q. AND WHO WAS IT THAT YOU ANSWERED TO?

A. BOB RAST.

Q. AND CAN YOU DESCRIBE YOUR DUTIES AND RESPONSIBILITIES?

A. I DID ALL THE ACCOUNTING, ACCOUNTS PAYABLE, RECEIVABLES, JOB COSTING, FINANCIAL STATEMENTS.

Q. WHAT IS JOB COSTING?

A. IT'S JUST WHERE WE CHARGE OR COST INVOICES AND STUFF AND KEEP UP WITH OUR JOB COST AND INCOME ON PROJECTS.

Q. AND WHO IS IT THAT DECIDES WHICH JOB GETS COSTED WITH AN EXPENSE?

A. USUALLY IT'S THE JOB SUPERINTENDENT OR MANAGEMENT, JOB FOREMAN, SUPERINTENDENT.

Q. IS IT EVER BOBBY RAST?

A. YES.

Q. WHERE WAS YOUR DESK IN RELATION TO BOBBY RAST' DESK?

[694] A. MOST OF THE TIME IT WAS RIGHT DOWN THE HALL.

Q. AND CAN YOU DESCRIBE HIS DUTIES AND RESPONSIBILITIES FOR RAST CONSTRUCTION WHILE YOU WERE THERE?

A. HE OVERSAW EVERYTHING WITHIN THE COMPANY.

Q. AND WHAT ABOUT DANNY RAST, WHAT WAS HIS JOB AT THE COMPANY?

A. DANNY WAS THE EXECUTIVE VICE-PRESIDENT AND MOST OF HIS DUTIES WERE FIELD RELATED.

Q. WHAT SORT OF FIELD-RELATED DUTIES DID HE HAVE?

A. HE WAS GENERAL SUPERINTENDENT WHERE HE OVERSAW ALL THE JOBS.

Q. AND WHO WERE THE OWNERS OF THE COMPANY WHILE YOU WERE THERE?

A. AT ONE TIME IT WAS – AT FIRST IT WAS JUST MR. RAST AND THEN HE AND HIS – THE SONS, THE 4 SONS, AND THEN I BELIEVE IN 2000 WE HAD AN EMPLOYEE STOCK WHERE SOME OF THE EMPLOYEES OWNED STOCK.

Q. WHAT PROPORTION OF THE COMPANY DID BOBBY AND DANNY RAST OWN IN, SAY, '99, 2000 AND 2001?

A. PROBABLY ABOUT 85, 90 PERCENT.

Q. TOGETHER?

A. YES.

Q. AND AS BETWEEN THE TWO BROTHERS, BOBBY AND DANNY, HOW MUCH DID EACH OWN?

[695] A. JUST OFF THE TOP OF MY HEAD, PROBABLY 40, 45 PERCENT EACH.

Q. WAS IT THE SAME FOR EACH OF THEM?

A. YES, SIR, PRETTY MUCH.

Q. MS. JONES, I AM GOING TO HAND YOU A DOCUMENT THAT'S BEEN MARKED AS GOVERNMENT'S EXHIBIT 22B AS IN BOY. THAT'S THE ARTICLES OF INCORPORATION FOR RAST CONSTRUCTION; IS THAT RIGHT?

I WOULD OFFER 22B INTO EVIDENCE.

MR. GLOOR: NO OBJECTION, YOUR HONOR.

THE COURT: IT WILL BE ADMITTED.

A. YES, SIR, IT IS.

Q. MS. JONES, I AM GOING TO HAND YOU A GROUP OF DOCUMENTS 83A THROUGH 83H, AND THEY HAVE BEEN ADMITTED INTO EVIDENCE ALREADY. I WOULD TURN YOUR ATTENTION TO 83H IN PARTICULAR. IF WE COULD PUBLISH THAT TO THE JURY, 83H. OH, FORGIVE ME. IS 83H IN EVIDENCE, MS. FOX?

THE CLERK: 83H?

MR. DILLON: H AS IN HOWARD?

THE CLERK: YES.

Q. (BY MR. DILLON) I'LL HAND IT BACK TO YOU, MS. JONES. IS 83H A FACSIMILE FROM PENNINGTON RAST?

A. YES, IT APPEARS TO BE.

Q. AND DOES IT APPEAR TO BE FROM SOMEBODY AT PENNINGTON RAST?

* * *

[741] MR. MCKNIGHT: NO QUESTIONS, YOUR HONOR.

MR. BROWN: NO, SIR.

THE COURT: PUGH DEFENDANT?

MR. GLOOR: MAY WE GO OUT OF ORDER, YOUR HONOR.

THE COURT: EXCUSE ME?

MR. GLOOR: MAY WE GO OUT OF ORDER? MAY I GO FIRST.

THE COURT: GOING WITH RAST CONSTRUCTION FIRST.

MR. GLOOR: YES, SIR. THANK YOU, SIR.

THE COURT: YOU'RE WELCOME.

CROSS-EXAMINATION BY MR. GLOOR:

Q. GOOD AFTERNOON, DONNA.

A. GOOD AFTERNOON.

Q. DONNA, HOW LONG HAVE YOU AND I WORKED TOGETHER?

A. TWENTY-THREE YEARS.

Q. I AS A COMPANY ATTORNEY FOR RAST AND YOU AS A BOOKKEEPER?

A. YES, SIR.

Q. AND DONNA, WHEN YOU FIRST CAME TO RAST, YOU WORKED DIRECTLY UNDER MR. HOLT RAST, DIDN'T YOU?

A. YES, I DID.

Q. AND LATER AS MR. HOLT RAST STARTED LETTING THE REINS GO, YOU WORKED UNDER MR. CHUCK RAST AS CFO, DIDN'T YOU?

A. I DID.

[742] Q. AND THEN AS CHUCK MOVED ON, YOU WORKED UNDER MR. TOM OGLE?

A. I DID.

Q. AND THEN TO BOB RAST?

A. YES.

Q. NOW, DONNA, IN THIS CASE, THE GOVERNMENT HAS ASKED YOU MULTIPLE TIMES ABOUT CODING A JOB TO THE MINOR PUMP STATION AND TO ANNUAL REHAB CONTRACTS, HAVE THEY NOT?

A. YES.

Q. HOW MANY TIMES WOULD YOU SUSPECT THAT YOU HAVE MET WITH MR. DILLON AND THE FBI ON THIS CASE GOING BACK FROM WHEN SUBPOENAS WERE FIRST ISSUED?

A. OH, PROBABLY FOUR, FOUR TIMES, I GUESS.

Q. FOUR TIMES? HOW MANY TIMES WOULD YOU SUSPECT THAT YOU HAVE TOLD THE GOVERNMENT THAT ABSOLUTELY NO BILLS IN RESPECT TO THE MINOR PUMP STATION AND ANNUAL REHAB WORK WAS EVER BILLED TO JEFFERSON COUNTY?

A. MANY TIMES, ALL FOUR TIMES.

Q. I WANT YOU TO EXPRESS TO THE JURY -- I'M SORRY. ISN'T IT A FACT THAT THE COST CODING YOU DO WHEN YOU COST CODE SOMETHING TO MINOR PUMP STATION OR TO ANNUAL REHAB CONTRACTS, THAT THAT'S FOR INTERNAL ACCOUNTING PURPOSES ONLY?

A. YES, SIR, IT'S INTERNAL, IT'S NEVER BILLED TO THE COUNTY.

[743] Q. HAVE YOU EVER SEEN AN INSTANCE WHEN WORK LIKE BOBBY OR DANNY OR RAST CONSTRUCTION WOULD DO FOR FRIENDS HAS EVER BEEN BILLED TO JEFFERSON COUNTY?

A. ABSOLUTELY NOT.

Q. AND HOW CAN YOU BE SURE?

A. BECAUSE I WOULD HAVE BILLED IT AND I WOULD HAVE SENT – I WOULD HAVE RECEIVED THE MONEY.

Q. ISN'T IT A FACT ALSO THAT THE WORK WAS ON A UNIT PRICE BASIS FOR THE COUNTY?

A. ABSOLUTELY, YES.

Q. AND AS WORK PROGRESSED THEY WERE PAID ON UNITS?

A. YES.

Q. AND THEREFORE, THESE EXPENSES THAT RELATED TO THE WORK THEY DID FOR FRIENDS COULD NOT BE BILLED TO THE COUNTY?

A. ABSOLUTELY.

Q. SO ANY REFERENCE TO THE FACT THAT A – AN EXPENSE IS COST CODED TO JEFFERSON – TO MINOR PUMP STATION OR ANNUAL REHAB WORK IS ONLY FOR YOUR INTERNAL PURPOSES ONLY?

A. YES, IT IS.

Q. NOW, DONNA, AFTER THIS CASE GOT STARTED, ISN'T IT A FACT THAT YOU AND I MET WITH REGARD TO EXPENSES THAT HAD BEEN INTERNALLY BILLED?

A. YES.

Q. DIDN'T YOU AND I HAVE QUESTIONS AS TO HOW THOSE [744] DEDUCTIONS WERE TAKEN ON INCOME TAX RETURNS FOR THE COMPANY?

A. YES.

Q. AND AS A RESULT OF OUR CONVERSATIONS, WHAT DID WE DECIDE TO DO, PLEASE, MA'AM?

A. WE MET WITH THE ACCOUNTANT AND ALL OF US DECIDED THAT WE NEEDED TO FILE AN AMENDED TAX RETURN BECAUSE WE HAD CLAIMED THOSE AS EXPENSE – DEDUCTIBLE EXPENSES WHEN THEY WEREN'T. WHEN WE REALIZED THAT THEY WERE NOT DEDUCTIBLE EXPENSES, WE VOLUNTARILY AND IMMEDIATELY DID AN AMENDED TAX RETURN.

Q. NOW, THE EFFECT OF USING THOSE DEDUCTIONS WOULD IN ESSENCE DECREASE NET PROFIT AND THEREFORE YOU WOULD PAY LESS TAXES; IS THAT CORRECT?

A. YES.

Q. SO AS A RESULT OF WHAT WE FOUND OUT, DONNA, WAS THAT DONE AT ANY DIRECTION OR IMPULSE OR INVESTIGATION OR AUDIT BY THE INTERNAL REVENUE SERVICE?

A. NO.

Q. ANY GOVERNMENT AGENCY TELL YOU TO DO THAT?

A. NO.

Q. ISN'T IT A FACT THAT IT WAS PURELY AND SIMPLY VOLUNTARILY DONE BY THE COMPANY?

A. YES.

Q. ISN'T IT A FACT THAT AS A RESULT OF THE INCOME [745] TAX RETURNS THAT THE COMPANY PAID SOME $26,000 IN ADDITIONAL INCOME TAXES?

A. YES.

Q. DONNA, WE HAVE HEARD THE TERM HALEY RAST, JOINT VENTURE IN THIS TRIAL. WHO IS HALEY RAST COMPOSED OF?

A. HALEY RAST IS A JOINT VENTURE. IT'S ACTUALLY A PARTNERSHIP OF TWO CORPORATIONS. THEY HAVE THEIR OWN FEDERAL I.D. NUMBER THAT WE FILE TAX RETURNS UNDER HALEY RAST AND IT IS COMPILED OF RAST CONSTRUCTION AND W. L. HALEY AND COMPANY OUT OF NASHVILLE, TENNESSEE.

Q. IS IT A FACT THAT THE JOINT VENTURE IS COMPOSED OF W. L. HALEY AND COMPANY, A CORPORATION?

A. YES.

Q. AND RAST CONSTRUCTION INC., A CORPORATION?

A. YES.

Q. DOES HALEY HAVE AN INDIVIDUAL TAX IDENTIFICATION NUMBER?

A. YES, THEY DO.

Q. DOES RAST CONSTRUCTION HAVE AN INDIVIDUAL TAX IDENTIFICATION NUMBER?

A. YES, THEY DO.

Q. DOES HALEY RAST, JOINT VENTURE HAVE AN INDIVIDUAL AND SEPARATE TAX I.D. NUMBER?

A. YES.

Q. ISN'T IT A FACT THAT HALEY RAST, JOINT VENTURE IS [746] A SEPARATE LEGAL ENTITY IN AND TO ITSELF FROM RAST CONSTRUCTION.

A. YES, IT IS.

Q. AND DOES IT FILE A SEPARATE TAX RETURN ITSELF?

A. YES, IT DOES.

Q. WHEN THE PROCEEDS FROM ONE OF THOSE JOINT VENTURE JOBS COMES IN, HOW ARE THE PROCEEDS DIVIDED AMONG THE JOINT VENTURE? IN OTHER WORDS, WHAT

PERCENTAGE DOES RAST CONSTRUCTION GET AND WHAT PERCENTAGE DOES W. L. HALEY GET?

A. IT WAS ALWAYS A 50/50 PROFIT SPLIT.

Q. OKAY. DONNA, YOU HAVE TESTIFIED ABOUT SOME WORK THAT WAS DONE AT MCNAIR STUDIO. AND I WOULD ASK YOU IF YOU KNOW OF THE RELATIONSHIP BETWEEN MR. HOLT RAST AND MR. CHRIS MCNAIR?

A. YES, SIR. THEY WERE VERY GOOD FRIENDS AS LONG AS I HAD BEEN AT RAST.

Q. DID YOU SEE THEM GO TO LUNCH TOGETHER?

A. YES.

Q. DID YOU OBSERVE THEM AT RAST CONSTRUCTION ON OCCASION?

A. YES, I DID.

Q. DID YOU OBSERVE THEM AT ONE OF THE RAST DAUGHTER WEDDINGS?

A. YES, I DID.

Q. ARE YOU AWARE OF THEIR RELATIONSHIP AT [747] MR. MCNAIR'S ANNIVERSARY, 50TH ANNIVERSARY?

A. YES.

Q. LET ME SHOW YOU WHAT'S BEEN MARKED AS DEFENDANT RAST EXHIBIT –

MR. DILLON: MAY I SEE THAT?

MR. GLOOR: YOU MAY.

MR. DILLON: YOUR HONOR, WE ARE GOING TO OBJECT TO THE RELEVANCY ON THIS DOCUMENT AND ALL THE SIMILAR ONES THAT MR. GLOOR INTENDS TO OFFER.

THE COURT: APPROACH UP HERE AND LET ME SEE WHAT YOU ARE TALKING ABOUT.

(SIDEBAR.)

MR. GLOOR: JUDGE, AS TO RELEVANCY, JUDGE, THEY HAVE INDICATED OUR DEFENSE IN THIS CASE IS FRIENDSHIP, ONE OF OUR DEFENSES. AND THEY BROUGHT IN THE FACT THAT WE PERFORMED LAPOR AND SERVICES AT MCNAIR STUDIO, AND I AM, IN DEFENSE OF THAT, SHOWING A FRIENDSHIP. AND EVIDENCE OF FRIENDSHIP BY VIRTUE OF PICTURES SHE HAS SEEN AND ACKNOWLEDGED AND CAN RECOGNIZE THESE GENTLEMEN, INITIALLY MR. HOLT RAST, WHO I DESCRIBED IN MY OPENING STATEMENT.

THE COURT: THAT IS NOT COMING IN, I CAN TELL YOU THAT. ALL THAT IS IS A PICTURE OF THE FOUNDER TO TRY TO INFLUENCE THE JURY. I UNDERSTAND YOUR POSITION WITH REGARD TO MCNAIR. I DON'T

UNDERSTAND YOUR POSITION SHOWING A PICTURE OF SOMEBODY PLAYING FOOTBALL WHO IS THE [748] FOUNDER OF THIS COMPANY OTHER THAN TRY TO GIVE CHARACTER EVIDENCE OF THE COMPANY.

MR. GLOOR: ALL RIGHT. AND PHOTOGRAPHS OF THE RAST CONSTRUCTION BUILDING.

MR. DILLON: NO OBJECTION TO THE COMPANY HEADQUARTERS.

THE COURT: YOU DON'T HAVE AN OBJECTION TO THAT?

MR. DILLON: NO, THAT'S JUST PICTURES OF HEADQUARTERS. I WOULD SAY THAT'S RELEVANT.

MR. GLOOR: PHOTOS MR. MCNAIR MADE OF MR. RAST AND GAVE TO THE BOYS, AFTER THEIR DAD DIED, AT NO CHARGE.

THE COURT: ARE YOU INSINUATING THAT THIS WAS IN EXCHANGE FOR WORK THAT WAS DONE WAS PARTLY IN EXCHANGE FOR THIS?

MR. GLOOR: SHOWING IT WAS FRIENDSHIP, YOUR HONOR.

MR. CLARK: DEMONSTRATES THE CLOSE –

MR. GLOOR: MR. RAST WAS DYING AND MR. MCNAIR CAME OVER AND TOOK LAST PICTURES OF THEM AND HIS SONS. AFTER THE FUNERAL WAS OVER WITH, MR. MCNAIR BROUGHT THE PHOTOS OVER TO THE BOYS. AND THE FINAL THING I HAVE IS A RESUME OF BOBBY AND DANNY AND CLAY BAILEY KEPT IN THE NORMAL COURSE OF THEIR EXECUTIVE PEOPLE AND ENGINEERS.

THE COURT: WHAT IS THE RELEVANCE OF THIS, JUST FOR THE RECORD, SO WE HAVE IT CLEAR? WE ARE TALKING THE [749] PICTURE THAT I SAID WOULD NOT COME IN THAT I SUSTAINED THE OBJECTION TO RELEVANCE IS DEFENSE EXHIBIT 120, AND THIS, I GUESS, WOULD BE RAST CONSTRUCTION.

MR. GLOOR: WE DO IT JUST GENERALLY, RAST DEFENDANTS, YOUR HONOR.

MR. CLARK: YOUR HONOR, THAT – DID YOU WANT TO HEAR ABOUT THAT DOCUMENT?

THE COURT: IF YOU WANT TO TRY TO GET IT IN, I GUESS SO, YES, SIR.

MR. CLARK: YOUR HONOR, THE GOVERNMENT HAS ATTACKED RAST CONSTRUCTION AND EACH OF THE RASTS, DANNY RAST AND BOBBY RAST. THE PURPOSE OF THAT IS SIMPLY TO SHOW THAT RAST HAD A LONG HISTORY AND A SUBSTANTIAL HISTORY AND HOLT RAST WAS A PERSON WHO HAD AN

INFLUENCE NOT ONLY ON THESE BOYS BUT WAS SOMEBODY WHO WAS WELL KNOWN IN THE COMMUNITY AND THEY DIDN'T HAVE ANY REASON TO BRIBE ANYBODY. AND THE COMPANY, AND THIS WAS THE LEGACY THAT STARTED IT ALL WHEN HE WAS IN COLLEGE.

THE COURT: OKAY. THE PICTURE, WHICH IS 120, IS A PHOTOGRAPH, 1941 PHOTOGRAPH OF MR. RAST WHO WAS A WELL-KNOWN FOOTBALL PLAYER; IT WILL NOT COME IN. OBJECTION SUSTAINED.

MR. GLOOR: I AM GOING TO KEEP IT. MAY I MENTION ONE THING. I DIDN'T KNOW THEY WERE GOING TO OBJECT TO THIS ONE UNTIL THIS MORNING BECAUSE IT CAME IN IN THE LAST [750] TRIAL IS THE REASON I BRING IT UP NOW, THAT PHOTOGRAPH.

THE COURT: WE ARE TALKING ABOUT DEFENDANT EXHIBITS 114, 115 AND 117 WHICH APPEAR TO BE RESUMES.

MR. GLOOR: YES, SIR.

THE COURT: BOBBY J. RAST, DANIEL B. RAST AND CLAY P. BAILEY?

MR. GLOOR: MY COMPANY REPRESENTATIVE. HE IS MY COMPANY REPRESENTATIVE.

THE COURT: I DON'T UNDERSTAND HOW THESE COME IN, THE REASON.

MR. GLOOR: YOUR HONOR, MY PURPOSE IS TO INDICATE THE STATUS AND THE STANDING OF THESE GENTLEMEN.

THE COURT: IN THE COMMUNITY OR SOMETHING?

MR. GLOOR: NO, SIR, JUST IN THE CONSTRUCTION INDUSTRY.

MR. CLARK: JUDGE, THEY WERE KEPT – THESE ARE RECORDS THAT ARE KEPT BY RAST CONSTRUCTION. THEY ARE RECORDS THAT WHEN THEY SUBMIT BIDS, THEY SUBMIT COPIES OF THE RESUMES. THIS IS INFORMATION THAT THE COUNTY HAS AND IT'S TO SHOW THAT THIS IS THE INFORMATION ABOUT WHO THESE PEOPLE WERE AT THE TIME BIDS WERE AWARDED.

THE COURT: I AM GOING TO SUSTAIN THE OBJECTION TO THE RELEVANCE OF IT. I THINK IT'S JUST BEING OFFERED FOR THE PURPOSE OF ATTEMPTING TO INFLUENCE THE JURY OF INAPPROPRIATE CHARACTER EVIDENCE. THERE IS APPROPRIATE **[VOLUME IV]** [751] WAYS TO INTRODUCE CHARACTER EVIDENCE, TRUTHFULNESS IF THEY TESTIFY OR FOR I DIDN'T COMMIT THE CRIME FOR HONESTY AND THINGS LIKE THAT. AND JUST INTRODUCING A RESUME IS NOT ONE OF THEM THAT I KNOW OF. ALL RIGHT.

ANYTHING ELSE? THOSE I AM GOING TO ALLOW IN. I THINK IT'S VERY QUESTIONABLE THE PICTURE OF MCNAIR. IS THAT MR. RAST?

MR. GLOOR: YES, SIR.

THE COURT: THE PICTURES TAKEN BY MR. MCNAIR I THINK THOSE ARE VERY QUESTIONABLE BUT I AM GOING – I UNDERSTAND YOUR THEORY, YOUR DEFENSE IS THAT YOU WERE DOING IT BECAUSE YOU WERE SUCH GOOD FRIENDS, ET CETERA, AND I AM GOING TO LET IT IN FOR WHATEVER IT'S WORTH. ANYTHING ELSE?

MR. GLOOR: THANK YOU.

(OPEN COURT.)

Q. (BY MR. GLOOR) LET ME SHOW YOU WHAT'S BEEN MARKED FOR IDENTIFICATION AS DEFENDANT RAST EXHIBIT 119 AND ASK YOU IF YOU RECOGNIZE THAT PHOTOGRAPH?

THE COURT: CAN WE DO IT THIS WAY? ARE YOU GOING TO PUT IT ON THE OVERHEAD.

MR. GLOOR: YES, SIR.

THE COURT: ALL RIGHT. LET'S – DOES THE GOVERNMENT HAVE ANY FURTHER OBJECTION OTHER THAN RELEVANCE.

[752] MR. DILLON: OFFER THEM ALL AND THEY WILL ALL BE ADMITTED. WE'LL DO IT IN A BATCH.

THE COURT: THE ONES I INDICATED WOULD BE ADMITTED OR CALL THE NUMBERS OUT FOR ME.

MR. GLOOR: YES, SIR. 119, 129, 130, 131, 122, 123, 121.

THE COURT: ALL RIGHT. THOSE ARE DEFENSE EXHIBITS TO RAST CONSTRUCTION COMPANY, INCORPORATED. DOES ANYBODY HAVE ANY OBJECTION TO THOSE?

MR. DILLON: OBJECTION.

THE COURT: THE GOVERNMENT OBJECTED TO RELEVANCE BUT FOR – SOME OF THOSE OBJECTED TO RELEVANCE. AS TO THOSE JUST EXPLAINED BY THE DEFENSE, I AM GOING TO OVERRULE THE OBJECTION. I AM GOING TO ADMIT THEM AND YOU CAN USE THE OVERHEAD SO WE DON'T HAVE TO GO THROUGH IT OVER HERE WITH THE WITNESS AND THEN AGAIN LET THE JURY SEE IT.

MR. GLOOR: ALL RIGHT.

THE COURT: THE SWITCH IS PROBABLY TURNED OFF THERE ON THE SIDE.

Q. (BY MR. GLOOR) DONNA, I ASK YOU IF YOU RECOGNIZE THAT PHOTOGRAPH, PLEASE, MA'AM?

A. I DO.

Q. AND WHO IS THAT A PICTURE OF?

A. OF MR. RAST, HOLT RAST AND CHRIS MCNAIR.

[753] Q. DO YOU HAVE ANY JUDGMENT AS TO WHEN THAT PHOTOGRAPH WAS TAKEN?

A. NO, I DON'T.

Q. LET ME SHOW YOU –

THE COURT: BE CAREFUL, YOUR NOTES ARE UP UNDER THE ELMO SOMETIMES.

MR. GLOOR: YES, SIR.

Q. – DEFENDANT'S EXHIBIT 129 AND ASK YOU IF YOU RECOGNIZE THAT PHOTOGRAPH?

A. YES, I DO.

Q. IS THAT THE COMPANY HEADQUARTERS OF RAST CONSTRUCTION?

A. IT IS.

Q. IS THAT A CURRENT PHOTO?

A. YES, I BELIEVE IT IS.

Q. ALL RIGHT. AND DEFENDANT'S EXHIBIT 130, DONNA, IS THAT ALSO A SIDE VIEW OF RAST CONSTRUCTION?

A. YES, SIR, IT IS.

Q. IS THAT LOCATED ON OXMOOR ROAD IN BIRMINGHAM?

A. IT'S ON SHANNON OXMOOR ROAD, YES.

Q. AND DONNA, IS THIS A PICTURE ON EXHIBIT 131 OF THE STORAGE YARD AT RAST CONSTRUCTION?

A. YES, SIR, IT IS.

Q. DONNA, I WILL ASK YOU IF YOU RECOGNIZE THIS PHOTOGRAPH IN EXHIBIT 121?

[754] A. I DO.

Q. AND DO YOU KNOW THE CIRCUMSTANCES SURROUNDING THE TAKING OF THAT PHOTOGRAPH, PLEASE, MA'AM?

A. MR. RAST WAS REAL SICK. IT WAS PROBABLY A COUPLE OF MONTHS BEFORE HE PASSED AWAY, IN NOVEMBER OF '98, I BELIEVE, AND MR. MCNAIR CAME DOWN AND TOOK SOME PHOTOGRAPHS OF MR. RAST WITH THE THREE SONS.

Q. ALL RIGHT. AND 121 IS MR. RAST A COUPLE MONTHS BEFORE HIS PASSING?

A. YES.

Q. THIS PHOTO HERE, WAS THAT TAKEN – EXHIBIT NUMBER 122, DONNA, WAS THAT TAKEN AT THE SAME TIME THAT MR. MCNAIR CAME?

A. YES, SIR, IT WAS.

Q. AND EXHIBIT 123, DONNA, WHO IS THAT A PICTURE OF?

A. MR. RAST AND BOB RAST.

Q. AND WAS THAT TAKEN AT THE SAME TIME?

A. YES, IT WAS.

Q. NOW, WHEN WERE THESE PHOTOGRAPHS GIVEN TO BOBBY AND DANNY?

A. THEY WERE ACTUALLY BROUGHT TO THE OFFICE MAYBE A COUPLE OF MONTHS AFTER MR. RAST PASSED AWAY.

Q. AND WHO BROUGHT THEM?

A. MR. MCNAIR.

Q. DID RAST CONSTRUCTION OR BOBBY OR DANNY PAY FOR [755] THOSE PHOTOGRAPHS?

A. RAST CONSTRUCTION I KNOW DID NOT.

Q. WAS IT UNUSUAL, DONNA, FOR RAST CONSTRUCTION OR BOBBY OR DANNY OR FOR MR. RAST FOR THAT MATTER TO DO WORKS OF CHARITY AND GIVE OF THEIR ASSETS TO OTHERS?

A. OH, NO, NOT AT ALL. IT WAS VERY COMMON.

Q. FOR INSTANCE, DID THEY DO ANYTHING PERSONALLY FOR YOU?

A. OH, YES, ABSOLUTELY. ANYTIME, WE HAVE GOTTEN MACHINES AT OUR HOUSE, THEY HAVE HELPED MY HUSBAND BUILD A DECK, THEY HELPED SEND MY KIDS THROUGH SCHOOL. ANYTIME I HAVE EVER ASKED FOR ANYTHING, THEY HAVE ALWAYS HELPED ME.

Q. HAVE THEY EVER HELPED YOU WHEN YOU DIDN'T ASK FOR THINGS?

A. OH, YES, ABSOLUTELY.

Q. DO YOU RECALL THEM HELPING CHURCHES?

A. YES.

Q. DO YOU RECALL THEM HELPING SCHOOLS?

A. YES.

Q. DO YOU RECALL THEM HELPING TORNADO VICTIMS?

A. YES.

Q. HAVE YOU EVER SEEN THEM DENY SOMEONE IN NEED?

A. I NEVER HAVE.

Q. SO THE PROVIDING OF SERVICES FOR MR. SWANN'S HOUSE WAS NOTHING UNUSUAL TO YOU?

[756] A. NO, IT WASN'T AT ALL.

Q. NOW, DONNA, WERE YOU EVER ON ANY OF THE SCENES, THE ACTUAL JOB LOCATIONS?

A. NO.

Q. YOU WERE AT ALL TIMES WITHIN THE OFFICE DOING THE PAPERWORK?

A. YES, SIR.

Q. TELL THE LADIES AND GENTLEMEN OF THE JURY DURING THE YEARS '99, 2000 AND 2001 HOW MANY CHECKS WOULD YOU BE PROCESSING A DAY DURING THAT PERIOD OF TIME, AS MANY AS HOW MANY?

A. WE WOULD GET INVOICES – WE WOULD GET ANYWHERE FROM 2 TO 300 INVOICES A DAY ON A NORMAL DAY. AROUND THE 10TH OF THE MONTH WHEN STATEMENTS COME IN, WE COULD PROBABLY GET 3, 400 PIECES OF MAIL THAT HAD TO DO WITH ACCOUNTS PAYABLE AT THE TIME.

MR. GLOOR: YOUR HONOR, I BELIEVE THAT'S ALL FOR RIGHT NOW. THANK YOU.

THE COURT: RAST INDIVIDUAL DEFENDANTS?

MR. CLARK: YES, SIR.

JUDGE, MAY I TAKE A MINUTE JUST TO STRAIGHTEN OUT THESE EXHIBITS.

MR. DILLON: THIS IS GOVERNMENT'S EXHIBIT 22, YOUR HONOR.

MR. CLARK: JUST TO CLARIFY SOMETHING, [757] GOVERNMENT'S 22B IS A DOCUMENT FROM THE STATE OF ALABAMA, THE ARTICLES OF INCORPORATION OF RAST CONSTRUCTION, INC. AND THIS DOCUMENT IS DATED, THE COVER PART, IT SAYS, THE FIRST SHEET SAYS '05, 3/16/05, BUT THE BODY OF IT SAYS THAT THIS –

MR. DILLON: OBJECTION TO FORM, JUDGE. THIS DOCUMENT IS SELF-AUTHENTICATING.

MR. CLARK: WELL, SO IS EVERY DOCUMENT THE GOVERNMENT'S ASKED THE WITNESSES ABOUT.

THE COURT: ALL RIGHT. BRING ME UP YOUR DOCUMENT YOU ARE TALKING ABOUT THAT YOU – COME ON UP.

(SIDEBAR.)

MR. CLARK: I AM JUST POINTING OUT THAT THE CORPORATIONS –

THE COURT: HANG ON JUST A SECOND. ALL RIGHT. YOU ARE REFERRING TO THIS DATE?

MR. CLARK: YES, SIR.

THE COURT: DATE OF INCORPORATION IS APRIL 30, 1976, AND YOU ARE REFERRING TO WHAT?

MR. CLARK: STAMPED IN 1990. JUST TO MAKE SURE THE JURY UNDERSTANDS, THIS COMPANY HAS BEEN IN EXISTENCE LONGER THAN SINCE 1990.

MR. DILLON: JUST ASK THEM THAT QUESTION. THAT WILL BE FINE.

MR. CLARK: THAT'S WHAT I WAS ABOUT TO DO.

[758] THE COURT: YEAH, I THINK THIS IS THE DATE IT WAS IN THE PROBATE OFFICE. THIS IS THE DATE IT GOT SENT TO THE SECRETARY OF STATE. I THINK THAT'S – YEAH, YOU CAN EXPLAIN THAT.

(OPEN COURT.)

Q. (BY MR. CLARK) MS. JONES, BEFORE WE STOPPED THERE A MOMENT, I WAS ASKING YOU ABOUT GOVERNMENT'S EXHIBIT 22B, AND IT'S GOT A DATE THERE AT THE BOTTOM, SAYS 3/16/05. DO YOU SEE THAT?

A. YES, SIR.

Q. BUT THIS DOCUMENT WHICH IS THE ARTICLES OF INCORPORATION OF RAST CORPORATION, INC. SHOWS THAT IN THIS FORM, RAST CORPORATION, INC. WAS INCORPORATED,

I DON'T KNOW IF YOU CAN SEE IT ON HERE, THE 30TH OF APRIL 1976?

A. YES, SIR.

Q. AND YOU KNOW THAT PRIOR TO 1976 HOLT RAST HAD HAD A CONSTRUCTION COMPANY, DO YOU NOT?

A. YES, SIR.

Q. GOING BACK TO RIGHT AFTER WORLD WAR II?

A. YES, SIR.

Q. AND HOLT RAST, THE FATHER OF BOBBY AND DANNY RAST AND THEIR TWO BROTHERS, CHUCK AND MIKE?

A. YES, SIR.

Q. AND YOU ARE AWARE THAT AT SOME POINT HOLT RAST TURNED THE BUSINESS OVER TO HIS FOUR SONS?

[759] A. YES, SIR.

Q. AND THEY ALL FOUR WERE INVOLVED IN THE BUSINESS WITH THEIR DAD AS CHAIRMAN; IS THAT CORRECT?

A. YES.

Q. AND THEN MIKE AND CHUCK LEFT AND BOBBY AND DAN CONTINUED TO RUN THE BUSINESS?

A. YES.

Q. AND I THINK YOU SAID BOBBY WAS THE PRESIDENT IN '99, 2000, SO FORTH?

A. YES, SIR.

Q. AND DANNY HAD A TITLE BUT DANNY WAS PRIMARILY IN THE FIELD, WAS HE NOT?

A. YES, SIR, HE WAS.

Q. AND BOBBY ALSO WAS IN THE FIELD, WAS HE NOT?

A. YES, SIR.

Q. AND YOU KNOW BOBBY AND DANNY?

A. YES, SIR.

Q. SEE THEM SITTING OVER HERE, IS THAT HOW THEY DRESSED WHEN THEY CAME TO THE OFFICE OR WORSE THAN THAT?

A. YES. THAT OR WORSE.

Q. ALL RIGHT. THEY DIDN'T COME TO WORK IN A SUIT AND TIE, DID THEY?

A. NEVER.

Q. NOW, LET ME ASK YOU ABOUT FIRST, THESE DOCUMENTS THAT THE GOVERNMENT PUT IN AND WE'LL START WITH 4A AND ALL [760] THESE DOCUMENTS RELATED TO THIS TRIP, TRIPS, THAT YOU WERE ASKED ABOUT.

NOW, ARE ALL OF THESE DOCUMENTS, 4A THROUGH 4R, DOCUMENTS THAT YOU MAINTAINED AT RAST CONSTRUCTION?

A. MOST OF THEM WERE. LIKE THE FAX FROM NANCY COLE, I DID NOT HAVE THAT ONE.

Q. SO THAT'S SOMETHING THAT THE GOVERNMENT HAS PRESENTED TO YOU?

A. YES, SIR.

Q. YOU KNOW WHO NANCY COLE IS, DON'T YOU?

A. YES, SIR.

Q. DO YOU KNOW HER TO BE THE WIFE OF BO COLE, A PROFESSOR AT CUMBERLAND LAW SCHOOL?

A. YES, SIR.

Q. AND YOU KNOW NANCY COLE AND BO COLE ARE CLOSE FRIENDS OF BOBBY RAST AND HIS WIFE, SARAH?

A. YES, SIR.

Q. KNEW THEY LIVED IN THE SAME NEIGHBORHOOD?

A. YES.

Q. DID THINGS TOGETHER?

A. YES, SIR.

Q. AND NANCY COLE, THEY POINT OUT NANCY COLE SCHEDULED THESE TWO TRIPS. GENERALLY WHEN BOB OR SARAH OR ANYBODY FROM THE COMPANY TRAVELED DURING THIS TIME, NANCY COLE SCHEDULED IT, DIDN'T SHE?

[761] A. YES, SHE DID.

Q. SO IT WASN'T UNUSUAL FOR NANCY COLE TO BE INVOLVED IN SCHEDULING A TRIP?

A. OH, ABSOLUTELY NOT.

Q. THIS FIRST DOCUMENT HERE, IT'S 4A, THE GOVERNMENT'S LAWYER REFERRED TO FREQUENTLY A TRIP TO EUROPE. THIS TRIP THAT'S REPRESENTED BY GOVERNMENT'S 4A WAS A TRIP TO ENGLAND, WASN'T IT?

A. YES, SIR.

Q. AND IT SAYS – IT HAS SOME INSTRUCTIONS FROM NANCY COLE TO BOB ASKING FOR HIM TO SIGN AND CHARGE CERTAIN THINGS TO HIS AMERICAN EXPRESS CARD. YOU KNEW, DID YOU NOT, THAT IT WAS NOT UNCOMMON WHEN NANCY MADE ARRANGEMENTS THAT CHARGES WERE INITIALLY CHARGED TO THAT AMERICAN EXPRESS CARD?

A. YES.

Q. AND THEN ON SOME OF THE TRIPS THERE WERE REIMBURSEMENTS MADE?

A. YES.

Q. AND ON THIS TRIP, WHILE IT WAS CHARGED TO BOB RAST AND I THINK THE GOVERNMENT LAWYER ASKED YOU DID RAST CONSTRUCTION – WENT THROUGH – DID RAST CONSTRUCTION PAY THIS OR THAT HOTEL, ISN'T IT CORRECT THAT HALEY RAST, A JOINT VENTURE, REIMBURSED RAST CONSTRUCTION FOR THAT TRIP TO EUROPE, OR TO ENGLAND? THEY'VE GOT ME SAYING EUROPE?

[762] A. YES, THEY DID.

Q. NOW, LET'S LOOK AT THE SECOND PAGE OF GOVERNMENT'S EXHIBIT 4A. THIS IS A DOCUMENT FROM NANCY COLE TO SOMEBODY AT GLOBAL BOOKING; IS THAT RIGHT?

A. YES, SIR.

Q. WAS THAT A DOCUMENT YOU KEPT IN YOUR OFFICE, OR WAS THAT NANCY COLE'S?

A. I BELIEVE IT WAS NANCY'S. I DON'T RECALL HAVING THAT DOCUMENT.

Q. LET'S GO – IT'S LISTING – YOU ARE ASKED ABOUT HOTEL BILLS AND WHAT THE TOTAL AMOUNT FOR THE HOTEL BILL WAS. IT SAYS ONE DOUBLE FOR JAMES MAIANSKI AND RONALD KURTA. DID YOU KNOW MAIANSKI WORKED FOR A MANUFACTURER THAT –

MR. DILLON: OBJECTION. ASSUMES FACTS NOT IN EVIDENCE.

MR. CLARK: IT'S CROSS-EXAMINATION, YOUR HONOR. AND HE IS LISTED ON THE DOCUMENT THAT THE GOVERNMENT PRESENTED.

THE COURT: I AM GOING TO – BRING THAT UP HERE BECAUSE I CAN'T READ IT. IT'S OUT OF FOCUS. CAN YOU READ THAT DOCUMENT?

MR. CLARK: I CAN'T READ MUCH OF ANYTHING.

THE COURT: I WILL OVERRULE THE OBJECTION.

Q. (BY MR. CLARK) YOU KNEW MR. MAIANSKI TO WORK FOR

* * *

[795] A. NO, SIR, HE IS NOT.

Q. AND NEITHER IS DANNY?

A. NO, SIR, HE IS NOT EITHER.

Q. AND THE IDEA THAT YOU'RE JUST – COST ACCOUNTING OR COSTING I GUESS IS THE TERM, IT'S JUST PUTTING IT SOMEWHERE?

A. YES, SIR.

Q. NOW, YOU WERE ASKED ABOUT MR. HOLT RAST AND MR. MCNAIR AND YOU SAID YOU KNEW THAT THEY WERE FRIENDS. ARE

YOU AWARE THAT THEY BOTH SERVED IN THE ALABAMA LEGISLATURE AT DIFFERENT TIMES?

A. YES, SIR.

Q. AND THAT MR. MCNAIR HAD A DAUGHTER THAT WAS KILLED IN THIS BOMBING?

A. YES, SIR.

Q. AND MR. RAST HAD A DAUGHTER WHO WAS KILLED AS A YOUNG WOMAN?

A. YES, SIR, IN A CAR ACCIDENT.

Q. AND DO YOU REMEMBER WHILE HOLT RAST WAS ALIVE WHETHER THE COMPANY DID SERVICE PROJECTS IN THE COMMUNITY?

A. OH, YES, SIR, WE ALWAYS DID.

Q. AND DID THAT CONTINUE AFTER HIS DEATH WITH HIS SONS?

A. YES, SIR, IT SURE DID.

Q. WHO'S ROBERT CULPEPPER?

[796] A. HE IS AN OPERATOR FOREMAN THAT'S WORKED FOR MR. RAST I BELIEVE SINCE 1976.

Q. DID THE RASTS HELP PAY THEIR DAUGHTER'S TUITION TO COLLEGE?

A. YES, SIR, THEY DID.

Q. DO YOU REMEMBER ONE OF MR. HOLT RAST' NEIGHBORS, I THINK NAMED MCCURLEY?

A. YES.

MR. DILLON: OBJECTION.

THE COURT: SUSTAINED.

Q. (BY MR. CLARK) NOW YOUR – IS YOUR OFFICE, THE RAST CONSTRUCTION OFFICE, IS THAT IN HOMEWOOD?

A. IT'S IN THE CITY OF BIRMINGHAM.

Q. CITY OF BIRMINGHAM. BUT IT'S NEAR HOMEWOOD?

A. YES, SIR, IT IS.

Q. AND REMEMBER SEVERAL YEARS AGO WHEN THERE WAS A BIG SNOWSTORM?

A. YES, SIR.

MR. DILLON: SAME OBJECTION.

MR. CLARK: ALL RIGHT. APPROACH UP HERE AND TELL ME WHAT YOU ARE ABOUT TO ASK ABOUT BECAUSE I CAN'T READ YOUR MIND.

(SIDEBAR.)

THE COURT: SNOWSTORM AND WHAT?

MR. CLARK: AND THEY ALLOWED THE CITY OF HOMEWOOD [797] TO DUMP DEBRIS IN THEIR YARD AND BRING STUFF THERE, DEMONSTRATING THAT THEY ARE A GOOD CITIZEN AND THEY DO THINGS FOR OTHER PEOPLE.

THE COURT: THAT'S A DIFFERENT THING IN PROVIDING MATERIAL OR GOODS OR – JUST LIKE SAYING HOLT RAST, THE SENIOR, DID IT; THAT'S NOT RELEVANT TO THE CASE. I AM GIVING YOU LEEWAY ON THE CORPORATION ON LIKE GIVING THINGS TO PEOPLE AND FIXING PEOPLE'S HOUSES BUT NOT DUMPING STUFF IN THE FRONT YARD, THE COUNTY PROCEEDING TO DUMP STUFF IN THEIR FRONT YARD.

MR. CLARK: DUMPING STUFF –

THE COURT: IN THE FRONT YARD. THAT IS WHAT YOU SAID, ISN'T IT?

MR. CLARK: WELL, THINGS IN THE YARD AT RAST CONSTRUCTION.

MR. DILLON: WE AGREE THAT THEY WERE –

THE COURT: I AM GIVING YOU GREAT LEEWAY. ANYTHING ELSE? I DON'T WANT TO KEEP RUNNING BACK UP HERE. DO YOU PLAN ON ASKING ANY OTHER THINGS? I MEAN, I UNDERSTAND IT'S PART OF YOUR THEORY OF DEFENSE BUT NOT DUMPING IN THE YARD.

DID YOU HAVE SOMETHING TO TELL ME?

MR. WISE: NO, SIR.

MR. CLARK: CAN I GET MY SHEET?

MR. GLOOR: YOUR HONOR, CAN I MAKE ONE OTHER STAB [798] AT THAT?

THE COURT: IF YOU FEEL COMPELLED TO, YES.

MR. GLOOR: CORPORATE PROPERTY, THE COMMUNITY CAME IN AND DUMPED THEIR DEBRIS, HOOVER, VESTAVIA, HOMEWOOD DUMPED THEIR DEBRIS AT THE CORPORATE LOT.

THE COURT: I DON'T THINK MOST OF WHAT'S GOING IN SHOULD BE COMING IN. I THINK IT'S BLATANT CHARACTER EVIDENCE THAT HAS NOTHING TO DO WITH THE CASE, BUT I AM LETTING IN ON AN ABUNDANCE OF CAUTION.

MR. GLOOR: I UNDERSTAND.

MR. CLARK: I AM GOING TO ASK HER ABOUT HOMEWOOD CHURCH OF CHRIST HAVING TO HAVE –

THE COURT: DOING WHAT FOR THEM?

MR. CLARK: HELPING THEM WITH THE CONSTRUCTION EFFORT, HABITAT FOR HUMANITY, HELPING BUILD HOUSES.

THE COURT: OKAY. ANYTHING ELSE?

MR. CLARK: I THINK THAT'S ABOUT IT.

THE COURT: IF IT'S GIVING MONEY, BUILDING, THAT KIND OF THING, I AM OKAY WITH IT. DUMPING STUFF IN THE FRONT YARD, PLAYING FOOTBALL –

MR. CLARK: OKAY.

THE COURT: – THAT'S ANOTHER THING.

(OPEN COURT.)

Q. (BY MR. CLARK) MS. JONES, ARE YOU AWARE OF WORK THAT RAST CONSTRUCTION DID FOR HOMEWOOD CHURCH OF CHRIST?

[799] A. YES, SIR, I DO.

Q. DID THEY ASSISTANT THEM IN SOME SORT OF CONSTRUCTION THERE?

A. I BELIEVE THEY PUT SOME SEWER PIPE IN OR DRAINAGE PIPE.

Q. AND DID RAST CONSTRUCTION HELP WITH BUILDING OF HABITAT FOR HUMANITY HOUSES?

A. YES, SIR, WE DID.

Q. AND WHEN EMPLOYEES AND OTHERS NEEDED A PIECE OF HEAVY EQUIPMENT, DID RAST CONSTRUCTION SEND IT ON?

A. OH, ABSOLUTELY, YES.

Q. AND DID THEY DO THAT FOR YOU?

A. YES, SEVERAL TIMES.

Q. BRING OUT LOADS OF GRAVEL TO YOUR HOUSE?

A. YES, SIR, AND THEY BROUGHT LOTS OF THINGS AND LOANED US MACHINES AND –

Q. DID THEY EVER CHARGE YOU FOR ANY OF THAT?

A. NEVER CHARGED. A LOT OF TIMES YOU DIDN'T EVEN HAVE TO ASK. IF BOB THOUGHT YOU NEEDED SOMETHING, HE HAD SOMEBODY UP THERE TO HELP YOU.

Q. IS IT FAIR TO SAY THAT IF SOMEBODY WAS IN NEED OR HAD SOME – THE RASTS WERE READY TO HELP THEM WITH IT?

A. YES.

Q. WAS, DID RAST PROVIDE A SCHOLARSHIP TO THE UNIVERSITY OF ALABAMA?

[800] A. YES, SIR, THEY DID.

Q. AND DID BOBBY AND DANNY RAST CONTINUE THIS PATTERN OF HELPING OTHER PEOPLE THEIR DAD HAD DEMONSTRATED?

A. YES, ABSOLUTELY.

MR. CLARK: THAT'S ALL.

MR. SALTER: NO QUESTIONS, YOUR HONOR.

THE COURT: HAVE I COVERED ALL THE DEFENDANTS OVER THERE? ALL RIGHT. GOVERNMENT? ANY REDIRECT?

MR. DILLON: JUST BRIEFLY, YOUR HONOR.

MS. ATLER, IF YOU COULD BRING UP THE LAST PAGE OF GOVERNMENT'S EXHIBIT 4M. PUBLISH IT TO THE JURY?

REDIRECT EXAMINATION BY MR. DILLON:

Q. THIS IS THE LAST PAGE OF GOVERNMENT'S EXHIBIT 4M, MS. JONES?

A. UH-HUH.

Q. THIS IS THE CONFIRMATION ON THE AIR TRAVEL FOR THE TRIP TO LONDON AND SCOTLAND IN 2001; IS THAT RIGHT?

A. THAT'S WHAT IT APPEARS TO BE.

Q. WHAT DAYS WAS DEFENDANT SWANN AND THE RASTS IN SCOTLAND AND LONDON ACCORDING TO THIS DOCUMENT?

A. FROM SEPTEMBER 6 OF 2001 TO SEPTEMBER 20 – WAIT A MINUTE, 21ST.

Q. TWO WEEKS?

A. YEAH, I WOULD ASSUME. THAT'S CLOSE.

* * *

APPENDIX H-9 (SWANN) VOLUME VII

UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006-OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

****

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[1658] Q. WOULD YOU EVEN HAVE REFERRED HIM TO YOUR WIFE?

A. PROBABLY NOT.

MR. BROWN: OKAY. THANK YOU.

JUDGE, I THINK THAT'S ALL I HAVE. THANK YOU.

THE COURT: RAST INDIVIDUAL DEFENDANTS?

MR. CLARK: YES, SIR.

CROSS-EXAMINATION BY MR. CLARK:

Q. MR. SWANN, I AM BILL CLARK. I REPRESENT BOB RAST AND DANNY RAST. YOU MENTIONED THE CONSENT DECREE THAT – AND DESCRIBED HOW IT WENT INTO EFFECT. EITHER PRIOR TO THE CONSENT DECREE OR ABOUT THE SAME TIME, JEFFERSON COUNTY HAD BEEN DEALING WITH THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, HAD THEY NOT, ABOUT A PLAN FOR SOLVING JEFFERSON COUNTY'S PROBLEMS?

A. YES.

Q. AND IS IT TRUE THAT THE PLAN THAT ADEM WAS CONSIDERING OR HAD PERHAPS APPROVED WAS TO COVER SOME 20-YEAR PERIOD APPROXIMATELY?

A. YES.

Q. AND WHEN EPA CAME IN, THEY COMPRESSED THAT TIME TO WHAT, 11 OR 12 YEARS OR LESS?

A. THEY WANTED MUCH LESS THAN THAT, THEY WANTED FIVE YEARS, BUT AS A RESULT OF THE NEGOTIATIONS I THINK IT ENDED UP BEING AROUND ELEVEN DEPENDING ON EXACTLY WHAT YOU CONSIDER TO BE THE END POINT.

[1659] Q. AND YOU MENTIONED EARLIER ABOUT PROBLEMS THAT AROSE WITH OVERFLOWS AND SEWAGE SPILLING OUT, I GUESS, AT PUMP STATIONS AND THINGS LIKE THAT AS BEING ONE OF THE PROBLEMS THE CONSENT DECREE WAS SUPPOSED TO DEAL WITH?

A. YEAH, USUALLY OVERFLOWS IN MAN HOLES.

Q. MAN HOLES. AND OFTEN THOSE OVERFLOWS AT MAN HOLES ARE IN STREETS OR IN NEIGHBORHOODS OR PLACES LIKE THAT?

A. YES.

Q. THE CONSENT DECREE EXPECTED PROBLEMS THAT WERE OVERFLOWS TO BE FIXED PROMPTLY, DID THEY NOT?

A. THEY EXPECTED SITUATIONS WHERE THE SYSTEM WAS BROKEN AND THOSE OVERFLOWS WERE GOING TO CONTINUOUSLY OCCUR TO BE FIXED IMMEDIATELY.

Q. AND IF YOU DIDN'T FIX THEM IMMEDIATELY, THEN YOU WOULD BE SUBJECT TO THESE PENALTIES YOU WERE ASKED ABOUT?

A. YES.

Q. AND IS IT CORRECT THAT BECAUSE OF THOSE PROBLEMS, THAT LED TO DOING EMERGENCY WORK?

A. YES.

Q. IN FACT, EVEN BEFORE THE CONSENT DECREE, THE COUNTY HAD TO DO EMERGENCY WORK, DID IT NOT?

A. OH, YES.

Q. AND THAT WAS NECESSARY SO YOU DIDN'T HAVE THIS STUFF SPILLING OUT ALL OVER AND CONTINUING TO CREATE THAT [1660] PROBLEM?

A. CORRECT.

Q. NOW, WHEN YOU STARTED ON THE CONSENT DECREE EMERGENCY PROBLEMS,

THE COUNTY HAD A VARIETY OF CONTRACTORS THAT WERE AVAILABLE 24 HOURS A DAY, 7 DAYS A WEEK, HOLIDAYS AND WOULD BE CALLED UPON TO SOLVE THESE PROBLEMS; IS THAT RIGHT?

A. WELL, WE HAD SOME THAT WOULD DO THAT, NOT ALL OF THEM WOULDN'T DO THAT.

Q. BECAUSE IT WAS SORT OF A PAIN TO HAVE TO BE AVAILABLE AT ANY TIME, WAS IT NOT?

A. CORRECT. I MEAN, IT WAS COSTLY AND THEY – SOME OF THEM DIDN'T WANT TO FOOL WITH COMING OUT AT NIGHT.

Q. AND BEFORE THE CONSENT DECREE, RAST CONSTRUCTION HAD BEEN ONE OF THOSE WHO WAS READY, WILLING AND ABLE TO ASSIST WHENEVER CALLED UPON, WEREN'T THEY?

A. YES. THEY WERE ONE OF OUR MAINSTAYS.

Q. AND THEY RESPONDED, WHETHER IT WAS CHRISTMAS, THANKSGIVING OR WHENEVER IT WAS?

A. YES. I KNOW OF SEVERAL OCCASIONS THAT THEY WERE OUT THANKSGIVING, CHRISTMAS.

Q. NOW, AT SOME POINT DURING THE TIME AFTER THE CONSENT DECREE WENT

INTO EFFECT, THERE STARTED A PROCESS WHERE THERE WERE ANNUAL CONTRACTS TO DEAL WITH THESE EMERGENCY SITUATIONS, WERE THERE NOT?

[1661] A. WELL, THE ANNUAL CONTRACTS WERE REALLY MEANT TO DEAL WITH EMERGENCY SITUATIONS WHERE WE NEEDED TO HAVE A LINING WORK DONE.

Q. PART OF THE REHAB WORK?

A. PART OF THE REHAB, YES.

Q. AND THOSE CONTRACTS WERE BID?

A. EVENTUALLY THEY WERE.

Q. NOW, LET ME ASK YOU ABOUT – YOU MENTIONED THAT YOU KNEW BOB RAST'S AND DANNY RAST'S FATHER. THAT WAS HOLT RAST?

A. YES, SIR.

Q. AND YOU WERE FAMILIAR FROM THE TIME YOU BEGAN WORKING AT JEFFERSON COUNTY WITH MR. RAST'S COMPANY, WERE YOU NOT?

A. YES.

Q. AND THEY HAD BEEN DOING BUSINESS WITH JEFFERSON COUNTY LONG BEFORE THIS CONSENT DECREE, HAD THEY NOT?

A. YES.

Q. AND HAD DONE EXCELLENT WORK, HAD THEY NOT?

A. YES.

Q. AND THEY DID WORK NOT ONLY IN JEFFERSON COUNTY BUT ALL OVER ALABAMA AND OTHER PLACES OUTSIDE ALABAMA?

A. YES.

Q. THEN AT SOME POINT AS MR. RAST GOT OLDER, BOB RAST TOOK OVER THE LEADERSHIP OF THE COMPANY; IS THAT [1662] RIGHT?

A. YES.

Q. NOW, ARE YOU – YOU'RE FAMILIAR ALSO, ARE YOU NOT, WITH W.L. HAILEY COMPANY?

A. YES, GENERALLY.

Q. OUT OF NASHVILLE?

A. YES.

Q. AND YOU WERE AWARE BEFORE THE CONSENT DECREE THAT W. L. HAILEY AND RAST CONSTRUCTION WERE DOING BUSINESS TOGETHER AS A JOINT VENTURE?

A. YES, I THINK THEY WERE.

Q. AND W.L. HAILEY WAS PRIMARILY INVOLVED IN TUNNELING, WERE THEY NOT?

A. YES, THAT WAS THEIR SPECIALTY.

Q. AND RAST CONSTRUCTION DID THE OPEN-CUT WORK?

A. YES.

Q. NOW, LET ME ASK YOU, YOU MENTIONED THAT YOU AND BOB BECAME FRIENDS OVER THE YEARS. IN ADDITION TO YOU AND BOB, YOUR WIVES, BOB'S WIFE SARAH AND YOUR WIFE NILA BECAME FRIENDS?

A. YES, THEY DID.

Q. AND YOU WERE FRIENDS AS COUPLES DOING THINGS TOGETHER?

A. YES.

Q. I BELIEVE YOU MENTIONED THAT YOU HAD A BROTHER, [1663] ONE BROTHER –

A. ONE BROTHER.

Q. – WHO PASSED AWAY?

A. YES, HE PASSED AWAY IN 2000.

Q. PRIOR TO HIS PASSING AWAY, BOB RAST INVITED YOUR BROTHER TO COME DOWN TO SPEND SOME TIME AT THE LAKE, DID HE NOT?

A. YES, WHEN HARRY WAS REALLY SICK.

Q. AND BOB VISITED HIM WHEN HE GOT INTO – HE WAS AT SOME POINT PUT IN A NURSING HOME, WAS HE NOT?

A. YES.

Q. BOB VISITED HIM THERE, DIDN'T HE?

A. YES, HE DID.

Q. NOW, YOU MENTIONED THAT YOUR MOTHER PASSED AWAY. WAS BOB RAST A PALL-BEARER?

MR. DILLON: OBJECTION.

THE COURT: SUSTAINED.

Q. (BY MR. CLARK) YOU WERE ASKED ABOUT TRIPS THAT YOU TOOK INCLUDING SKI TRIPS. THOSE TRIPS, THE EXPENSES WERE DIVIDED ON SOME; IS THAT TRUE?

A. YES.

Q. SOME YOU REIMBURSED BOB RAST?

A. SOMETIMES, YES.

Q. SOME OF THE SKI TRIPS YOU PAID FOR LIFT TICKETS –

[1664] A. SOMETIMES, YES.

Q. – FOR BOB RAST? YOU ALL WOULD SHARE MEALS FROM TIME TO TIME?

A. YES.

Q. NOW, YOU ALSO HAD DINNER AT EACH OTHER'S HOMES, DID YOU NOT?

A. YES, WE DID.

Q. AND YOU WENT OUT TO DINNER TOGETHER?

A. YES.

Q. AND THAT'S BEEN GOING ON FOR QUITE SOME TIME, HASN'T IT?

A. OH, YES, SIR, SINCE – I MEAN THE MID '80S.

Q. BUT WELL BEFORE THIS CONSENT DECREE?

A. CORRECT.

Q. IN FACT, YOU WENT TO FOOTBALL GAMES TOGETHER?

A. WE DID.

Q. AND YOU ARE AN AUBURN FAN?

A. I AM.

Q. AND BOB RAST IS A BIG ALABAMA FAN, IS HE NOT?

A. HE CERTAINLY IS.

Q. AND WHY IS THAT?

A. HIS FATHER WAS AN ALL-AMERICAN AT ALABAMA.

Q. DID YOU FROM TIME TO TIME WHEN ALABAMA PLAYED AT AUBURN TAKE THE

RASTS DOWN AND PAY FOR THEIR TICKETS THERE?

[1665] A. YES, WE DID. I THINK THE FIRST TIME ALABAMA PLAYED AT AUBURN, WE WENT.

Q. AND DID THEY RECIPROCATE FROM TIME TO TIME WHEN THEY PLAYED AT ALABAMA?

A. YES.

Q. DID YOU HAVE HOLIDAY GET-TOGETHERS WITH THE RASTS, YOU AND YOUR WIFE AND THE RASTS?

A. YES.

Q. BOB RAST. YOU AND YOUR WIFE DON'T HAVE CHILDREN?

A. NO, WE DON'T.

Q. AND BOB AND HIS WIFE HAVE FOUR CHILDREN?

A. YES.

Q. AND FROM TIME TO TIME, WERE YOU AT THEIR HOUSE WHEN THEIR CHILDREN WERE THERE?

A. SURE.

Q. CHRISTMASTIME?

A. YES.

Q. AND WAS THAT A SPECIAL TIME FOR YOU ALL WITHOUT CHILDREN TO BE WITH A FAMILY THAT HAD CHILDREN?

A. CERTAINLY.

Q. LET ME ASK YOU ABOUT – YOU HAVE HEARD THE TESTIMONY ABOUT THIS 1999 TRIP AND YOU DESCRIBED THE PURPOSE OF THE TRIP. DO YOU RECALL THAT DAVID WALLER WITH W. L. HAILEY AND HIS DAUGHTER WERE ON THE TRIP?

A. YES.

[1666] Q. AND TIM WALKER WITH W.L. HAILEY?

A. YES.

Q. AND JOHN MARIANSKI WAS ON THE STRIP?

A. YES, HE WAS.

Q. AND THIS TRIP WAS NOT A SECRET THAT WAS HIDDEN FROM JEFFERSON COUNTY OFFICIALS, WAS IT?

A. NO. IN FACT, I DISCUSSED IT WITH COMMISSIONER MCNAIR BEFORE WE WENT.

Q. AND IT WAS A TRIP THAT WAS EDUCATIONAL. IT WAS FOR EDUCATIONAL PURPOSES, WAS IT NOT?

A. YES.

Q. NOW, LET ME ASK YOU ABOUT THE TRIP IN 2001. I THINK YOU DESCRIBED WHAT HAPPENED. WAS THAT DECISION THAT YOUR WIFE MADE NOT TO GO ON THAT TRIP, WAS THAT SOMEWHAT OF A LAST-MINUTE DECISION?

A. YES IT WAS. I MEAN, THE TRAVEL ARRANGEMENTS HAD BEEN MADE AND – BUT I AM NOT SURE HOW MANY DAYS, A COUPLE OF DAYS BEFORE I THINK SHE MADE THAT CALL.

Q. AND IT HAD BEEN PLANNED, YOUR FAMILY AND BOB AND SARAH AND HIS BROTHER DANNY AND CHERYL WOULD ALSO BE ON THAT TRIP?

A. JUST THOSE THREE COUPLES, YES. THERE WAS NO OTHER FAMILY.

Q. AND BOB RAST CONVINCED YOU THAT THEY WANTED YOU TO GO AND YOU WENT?

[1667] A. YES.

Q. NOW, YOU TALKED ABOUT BEING IN THE HOSPITAL WITH YOUR HEART ATTACK. YOU HAVE BEEN HOSPITALIZED AT OTHER TIMES, HAVE YOU NOT?

A. YES, I HAVE.

Q. BOB RAST BROUGHT YOU HOME FROM THE HOSPITAL?

A. HE DID ON A COUPLE OF OCCASIONS.

Q. MR. SWANN, HAVE BOB RAST OR DANNY RAST OR RAST CONSTRUCTION EVER ATTEMPTED TO BRIBE YOU?

A. NO.

Q. HAVE THEY EVER ATTEMPTED TO INFLUENCE YOU IN ANY WAY IN CONNECTION WITH YOUR WORK AT JEFFERSON COUNTY?

A. NO.

Q. HAVE THEY EVER ASKED YOU TO DO ANYTHING ILLEGAL?

A. NOT TO MY UNDERSTANDING.

Q. HAVE THEY – THESE TRIPS THAT YOU HAVE HEARD ABOUT AND OTHER BENEFITS THAT MAY HAVE BEEN PROVIDED BY RAST OR EITHER RAST OR RAST CONSTRUCTION, DID YOU CONSIDER ANY OF THAT TO BE A BRIBE?

A. NO, I DID NOT.

Q. MR. SWANN, DID YOU TREAT RAST CONSTRUCTION AND BOBBY RAST AND DANNY RAST LIKE YOU DID ANY OTHER CONTRACTOR OR OWNERS?

A. I THINK I DID. I MEAN, IN FACT I THINK AT TIMES I MIGHT HAVE BEEN TOUGHER ON THEM BECAUSE OF FRIENDSHIP.

[1668] Q. AND YOU MENTIONED IN YOUR TESTIMONY EARLIER ABOUT CLASSIFICATIONS.

ONE OF THE CLASSIFICATIONS I THINK IS CLASSIFICATION F?

A. I THINK SO.

Q. IS THAT THE MAJOR PLANT CLASSIFICATION CONSTRUCTION?

A. YES.

Q AND THAT'S THE ONE WHERE THERE CAN BE HUGE 250 MILLION DOLLAR CONTRACTS AND SO FORTH?

A. WELL, THE LARGEST I CAN REMEMBER AT THE MOMENT IS 120 MILLION THAT BRASFIELD & GORRIE GOT.

Q. AND YOU ARE AWARE, ARE YOU NOT, THAT RAST CONSTRUCTION APPLIED FOR THAT CLASSIFICATION TWICE AND WAS TURNED DOWN?

A. YES, I AM.

Q. MR. SWANN, DID THE DECISIONS THAT YOU MADE AS THE DIRECTOR OF THE JCESD AT JEFFERSON COUNTY, WERE THOSE DONE WITH THE BEST INTERESTS OF THE CITIZENS OF JEFFERSON COUNTY IN MIND?

A. I THINK THEY WERE, YES.

Q. AND THEY WERE NOT MADE WITH ANY INTENT TO PAY BACK OR BENEFIT THE RASTS, WERE THEY?

A. NO.

Q. AND YOU DID NOT CONSIDER ANYTHING THAT MIGHT HAVE BEEN DONE BY BOB RAST THAT YOU MIGHT HAVE BENEFITED FROM [1669] AS BEING DONE FOR THAT PURPOSE, DID YOU? THAT IS, TO INFLUENCE YOU?

A. NO, I DID NOT.

Q. NOW, YOU MENTIONED YOUR HOUSE AND THAT YOUR WIFE WAS DEALING WITH SUBCONTRACTORS. WERE YOU AWARE THAT FROM TIME TO TIME YOUR WIFE DEVELOPED SOME CONFLICT WITH SUBCONTRACTORS?

A. YES.

Q. AND DID YOU KNOW THAT AT TIMES THOSE CONTRACTORS HAD BEEN SUGGESTED BY SOMEONE AT RAST?

A. I MAY HAVE KNOWN THAT. I DON'T RECALL SPECIFICALLY.

Q. DID YOU KNOW PRIOR TO THESE CHARGES COMING UP THAT ON OCCASION THOSE CONTRACTORS WHO HAD BEEN SUGGESTED AND WHO DIDN'T GET PAID CAME BACK TO BOB RAST, AND HE PAID THEM BECAUSE HE FELT RESPONSIBLE PRIOR TO ALL THIS?

A. I DID NOT KNOW THAT AT THE TIME, NO.

MR. CLARK: JUST A MINUTE, YOUR HONOR.

Q. MR. SWANN, JUST TO BE CERTAIN THAT I COVERED IT, I AM NOT SURE, DID ANY OF THE TRIPS OR ANY OTHER THING THAT MR. RAST OR BOBBY OR DANNY OR RAST CONSTRUCTION MAY HAVE DONE FOR YOU, DID YOU CONSIDER THAT IN ANY WAY TO BE ANY REWARD FOR ANY WORK THAT YOU DID AT JEFFERSON COUNTY?

A. NO.

Q. NOW, MR. SWANN, YOU KNEW AT THAT TIME AND YOU [1670] KNOW NOW THAT RAST AND THEIR JOINT VENTURE PARTNER AND PUGH AND THEIR JOINT VENTURE PARTNER WERE COMPETITORS?

A. THEY CERTAINLY WERE.

MR. CLARK: I THINK THAT'S ALL. THANK YOU.

THE COURT: RAST CORPORATE DEFENDANTS?

MR. GLOOR: NONE, YOUR HONOR.

THE COURT: F. W. DOUGHERTY?

MR. SALTER: JUST A COUPLE, PLEASE.

CROSS-EXAMINATION BY MR. SALTER:

Q. MR. SWANN, MY NAME IS STEVE SALTER AND I REPRESENT PAT DOUGHERTY AND

HIS WIFE AND HIS COMPANY, DOUGHERTY ENGINEERING.

YOU MENTIONED OR TESTIFIED THAT IT WAS COMMISSIONER MCNAIR THAT HAD THE FINAL DECISION ON THE HIRING CONSULTING ENGINEERS.

A. YES.

Q. DID THAT DECISION BY COMMISSIONER MCNAIR HAVE TO BE BLESSED OR APPROVED BY THE WHOLE COUNTY COMMISSION AT SOME POINT IN TIME IN THE PROCESS OR –

A. YES, IT DID.

Q. BUT YOU DIDN'T HAVE THAT DECISION-MAKING AUTHORITY AS TO WHO WOULD BE THE ENGINEER, OUTSIDE ENGINEER?

A. NO.

Q. WAS MR. DOUGHERTY AND HIS COMPANY, DOUGHERTY

* * *

APPENDIX H-10 (ROSS) VOLUME VII

UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006 – OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

* * * * * * * * * * * * * * * * * *

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[1784] Q. GOOD AFTERNOON, MS. ROSS.

A. GOOD AFTERNOON.

Q. MY NAME IS LAURA CHANEY. I REPRESENT DANNY AND BOBBY RAST. THANKS FOR COMING UP THIS AFTERNOON.

NOW, DO YOU KNOW BOBBY AND DANNY RAST?

A. YEAH, I SURE DO.

Q. HOW DO YOU KNOW BOBBY AND DANNY?

A. 1972 WHEN I WAS GETTING THROUGH SCHOOL AT AUBURN UNIVERSITY I TOOK A JOB WITH A COMPANY CALLED CONSOLIDATED PIPE AND SUPPLY COMPANY HERE IN BIRMINGHAM. I WAS A SALES REP FOR THEM, WAS INTRODUCED TO MR. HOLT RAST, THEIR FATHER, WHO WAS OF COURSE THE OWNER AND THE PRESIDENT AND CHIEF OPERATOR AND RUNNER AT THAT TIME OF RAST CONSTRUCTION COMPANY. I GOT TO KNOW BOBBY AND HIS TWO BROTHERS, AND AS A MATTER OF FACT HIS WHOLE FAMILY, AND I GUESS IN '72 I THINK THEY WERE – I PROBABLY MET THEM THE FIRST TIME IN '73 OR '74 WHEN THEY

WERE WORKING IN HIGH SCHOOL AND COMING UP WORKING FOR HIS DAD.

Q. DURING THE TIME SINCE 1972 UP TO TODAY, DID Y'ALL BECOME GOOD FRIENDS?

A. I WOULD SAY WE ARE GOOD ACQUAINTANCES ANYWAY. I THOUGHT A LOT OF HIM AND I HAD KNOWN HIM AND HIS FAMILY AND BROTHERS.

Q. DURING THAT TIME OVER THOSE YEARS, DID ANY – WOULD BOBBY RAST OR DANNY RAST OR A MEMBER OF HIS FAMILY [1785] DO ANYTHING FOR YOU?

A. WELL, YES, MA'AM. IN FACT, HOLT RAST IN A WAY TOOK ME UNDER HIS WING. AS A YOUNG PERSON, I DIDN'T KNOW MUCH ABOUT THE PIPE BUSINESS.

THE COURT: ALL RIGHT. HANG ON A SECOND. JUST ANSWER HER QUESTION. HER QUESTION WAS DIRECTLY ABOUT BOBBY OR DANNY RAST.

THE WITNESS: OKAY.

A. DID THEY DO ANYTHING FOR ME?

Q. YES, SIR.

A. ONE THING I CAN THINK OFF OFFHAND WAS THAT I HAD – A FEW YEARS AGO I HAD A – I LIVED IN HOOVER AND I HAD A WATER LINE, COPPER WATER LINE GO BAD IN MY

YARD, AND I WOULD CALL UP, I WAS TRAVELING IN BACK AND FORTH AND I HAD A COUPLE OF PEOPLE, HAD TWO OR THREE DIFFERENT PLUMBING CONTRACTORS COME UP AND GIVE ME PRICES ON IT, AND THEY WERE BETWEEN FIVE AND SEVEN THOUSAND, I GAVE BOBBY A CALL. I HADN'T SEEN HIM IN SOME TIME, AND I GAVE HIM A CALL AND ASKED HIM IF I COULD EXPLAIN THE PROBLEM AS BEST I HAD SEEN IT AND ASKED IF I COULD TALK TO HIM ABOUT RENTING A PIECE OF EQUIPMENT FOR IT. AND HE SAID WHY DON'T YOU JUST LET ME SEND ONE OF MY MEN OVER AND TAKE A LOOK AT IT AND WE'LL SEE WHAT WE NEED TO DO. I WILL ADVISE YOU ON WHAT TO DO. AND I SAID I WILL APPRECIATE YOU DOING THAT AND I WILL PAY YOU WHATEVER, JUST ANYWAY, [1786] HE ENDED UP SENDING MEN OVER AND I VISITING WITH THEM AND THEN I LEFT AND WITHIN TWO DAYS THEY HAD FIXED THE PROBLEM WHICH COST QUITE A BIT. AND I CALLED BOBBY UP AND I SAID, BOBBY, THAT WASN'T WHAT I WAS ASKING FOR, BUT HOW MUCH IS IT, AND I WANT TO COME OVER AND PAY YOU RIGHT NOW. HE SAYS, I WILL GET YOU AN INVOICE LATER. YOU KNOW, A COUPLE WEEKS LATER I CALLED HIM AND I SAID I NEED TO PAY YOU FOR THE WORK YOUR MAN DID IN MY PLACE. ANYWAY, HE SAID RONNIE, THAT'S FOR OLD TIMES, THANK YOU.

I WILL MENTION ALONG THAT TIME AND IT'S REAL PERSONAL TO ME, I DEVELOPED A DRINKING PROBLEM.

THE COURT: HANG ON, HANG ON. WAIT FOR ANOTHER QUESTION, OKAY.

THE WITNESS: OKAY.

Q. (BY MS. CHANEY) SIR, YOU MENTIONED THAT AT SOME POINT IN TIME THAT YOU HAD DEVELOPED A DRINKING PROBLEM. ASSOCIATED WITH, THAT PROBLEM, DID THE RAST FAMILY OR BOBBY OR DANNY –

MR. DILLON: OBJECTION.

THE COURT: ALL RIGHT. COME UP HERE BECAUSE I HAVE GOT TO – I CAN RULE ON IT BUT I HAVE GOT TO KNOW WHAT IT IS.

(SIDEBAR.)

THE COURT: ALL RIGHT. WHAT IS IT.

MS. CHANEY: DURING THIS TIME HE IS GOING TO

* * *

APPENDIX H-11 (LOCHAMY) VOLUME VIII

UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006 – OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

* * * * * * * * * * * * * * * * * *

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[2005] MS. WILEY: NO, YOUR HONOR.

THE COURT: ALL RIGHT. YOU CAN STEP DOWN. YOU CAN BE EXCUSED.

THE WITNESS: THANK YOU, SIR.

THE COURT: RAST INDIVIDUAL DEFENDANTS, CALL YOUR NEXT WITNESS.

MS. CHANEY: CALL BOB LOCHAMY.

(INDIVIDUAL RAST DEFENDANTS WITNESS SWORN, BOB LOCHAMY.)

THE CLERK: PLEASE STATE YOUR NAME AND SPELL YOUR LAST NAME.

THE WITNESS: BOB LOCHAMY, L-O-C-H-A-M-Y.

THE CLERK: IN WHAT CITY AND ASK STATE DO YOU LIVE?

THE WITNESS: I LIVE IN HOOVER, ALABAMA.

DIRECT EXAMINATION BY MS. CHANEY:

Q. GOOD AFTERNOON, MR. LOCHAMY. YOU STATED THAT YOU LIVE IN HOOVER, ALABAMA?

A. CORRECT.

Q. HOW LONG HAVE YOU LIVED IN HOOVER, SIR?

A. TWENTY-SIX YEARS.

Q. ARE YOU EMPLOYED?

A. SELF-EMPLOYED.

Q. WHAT DO YOU DO?

A. CONSULTANT, MEDIA RELATIONS CONSULTANT.

[2006] Q. DO YOU KNOW OR ARE YOU FAMILIAR WITH EITHER BOB RAST OR DANNY RAST?

A. YES, I AM.

Q. AND HOW ARE YOU FAMILIAR WITH EITHER OF THEM?

A. I HAVE KNOWN BOTH SINCE HIGH SCHOOL DAYS BACK IN THE '60S.

Q. ARE YOU CLOSER WITH BOBBY OR DANNY?

A. BOBBY.

Q. SO HOW LONG DO YOU SAY YOU HAVE KNOWN BOB RAST?

A. FORTY-ONE YEARS.

Q. IN THOSE 41 YEARS, HAS THERE BEEN AN OCCASION WHEN BOB RAST HAS ASSISTED YOU OR HELPED YOU WITH ANY ISSUE YOU HAD?

A. YES.

Q. AND COULD YOU RECALL THE FIRST TIME OR ONE OF THE TIMES HE HAS HELPED YOU?

A. ONE OF THE FIRST TIMES WE HAD HAD A TREE REMOVED IN OUR YARD, A RATHER LARGE SWEET GUM TREE. AND AFTER THE TREE HAD BEEN REMOVED, THE STUMP REMAINED. AND IN CONVERSATION THAT I WAS HAVING WITH BOBBY ONE NIGHT, MY WIFE AND I WERE HAVING DINNER WITH HE AND HIS WIFE AND SOME FRIENDS, AND I MENTIONED THAT WE HAD A PROBLEM THAT THE STUMP REMAINED AND I DIDN'T KNOW WHAT WE WERE GOING TO DO WITH IT, A RATHER LARGE STUMP. AND HE COMMENTED TO ME, DON'T WORRY ABOUT IT, WE'LL TAKE CARE OF IT. AND I SAID, [2007] WE WILL? AND HE DIDN'T MEAN WE, HE AND I. SO HE THEN PROCEEDED OVER THE NEXT COUPLE OF DAYS TO BRING SOME EQUIPMENT UP AND DIG THAT STUMP OUT. I REMEMBER THAT PRECISELY BECAUSE

AFTER THE FIRST DAY WHEN I CAME HOME THAT AFTERNOON THERE WAS A CRATER IN OUR FRONT YARD WHERE HIS EQUIPMENT HAD TAKEN THE TREE OUT, AND I CALLED HIM AND ASKED HIM WAS THAT IT, AND HE SAID, OH, NO, THEY WILL FINISH. AND THEY CAME BACK THE NEXT DAY AND FINISHED THAT PROJECT OFF FOR ME, AS A FRIEND.

Q. AND AFTER THAT OR BEFORE THAT, HAS HE DONE ANYTHING ELSE FOR YOU TO HELP YOU?

A. WELL, AFTER THAT, A COUPLE YEARS AFTER THAT, AND MY CAREER HAS HAD UPS AND DOWNS AND PEAKS AND VALLEYS, AND WE WERE IN A PRETTY DECENT VALLEY ONE TIME, AND HE AND I IN CONVERSATION, I THINK HE COULD SENSE THAT SOMETHING WAS WRONG, AND IT WAS RIGHT NEAR THE HOLIDAYS, RIGHT NEAR CHRISTMAS, AND HE ASKED ME HOW THINGS WERE GOING. AND I TOLD HIM AT THAT TIME THEY WERE, THINGS WERE OKAY BUT I REALLY – AND I THINK HE COULD SENSE VERY CLEARLY AND I SAID BUT I AM NOT QUITE SURE HOW WE ARE GOING TO TAKE CARE OF CHRISTMAS. AND AT THAT POINT, HE SAID, WHAT DO YOU MEAN, TAKE CARE OF CHRISTMAS. I SAID, WELL, TWO LITTLE BOYS, GIFTS. AND HE AT THAT POINT THEN TURNED TO ME AND GAVE ME SOME MONEY TO TAKE CARE OF CHRISTMAS, $300. AND I HAD MENTIONED IN CONVERSATION

THAT NOT BEING ABLE TO TAKE [2008] CARE OF CHRISTMAS, I SAID, I DON'T EVEN THINK I AM GOING TO BE ABLE TO GET THE BOYS A FOOTBALL FOR CHRISTMAS. AND HE SAID, I AM GOING TO HELP YOU WITH THIS, HE SAID, BUT YOU HAVE GOT TO PROMISE ME YOU WILL GET THAT FOOTBALL. SO WITH THE HOLIDAY GIFT, THAT WAS THE AGREEMENT WE HAD.

Q. AT THAT TIME, WAS THAT $300 A SUBSTANTIAL HELP TO YOU?

A. ABSOLUTELY.

Q. DID BOB EVER ASK YOU TO REPAY HIM THE MONEY?

A. NO.

MS. CHANEY: THAT'S ALL.

THE COURT: SWANN?

MR. MCKNIGHT: NO QUESTIONS.

THE COURT: YESSICK?

MR. WISE: NO, SIR.

THE COURT: PUGH?

MR. BROWN: NO, SIR.

THE COURT: RAST CORPORATE?

MR. GLOOR: NO, SIR.

THE COURT: F. W. DOUGHERTY?

MR. SALTER: NO, YOUR HONOR.

THE COURT: GOVERNMENT?

MS. WILEY: NO QUESTIONS.

THE COURT: YOU CAN STEP DOWN. YOU WILL BE EXCUSED. THANK YOU.

* * *

APPENDIX H-12 (SMITH) VOLUME VIII

UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	2:05-CR-544-LSC
PLAINTIFF,	SEPTEMBER 18, 2006 – OCTOBER 2, 2006
V.	BIRMINGHAM, AL
JACK W. SWANN, ET AL,	
DEFENDANTS.	

* * * * * * * * * * * * * * * * * * *

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE L. SCOTT COOGLER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

WILLIAM D. DILLON
DEANA TIMBERLAKE-WILEY
U.S. DEPARTMENT OF JUSTICE
ATLANTA, GEORGIA

FOR THE DEFENDANTS:

REPRESENTING JACK W. SWANN:

DAVID MCKNIGHT
SAMUEL BRISKMAN
BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
BIRMINGHAM, ALABAMA

REPRESENTING JOSEPH E. "EDDIE" YESSICK:

RONALD W. WISE
MONTGOMERY, ALABAMA

* * *

[2009] RAST INDIVIDUAL DEFENDANTS, CALL YOUR NEXT WITNESS.

MS. CHANEY: AT THIS TIME WE CALL STEVE SMITH. (RAST INDIVIDUAL DEFENDANTS WITNESS SWORN, STEVE SMITH.)

THE CLERK: PLEASE STATE YOUR NAME FOR THE RECORD.

THE WITNESS: MICHAEL STEVEN SMITH.

THE CLERK: IN WHAT CITY AND STATE DO YOU LIVE?

THE WITNESS: BIRMINGHAM, ALABAMA.

DIRECT EXAMINATION BY MS. CHANEY:

Q. MR. SMITH, YOU SAID YOU LIVED IN BIRMINGHAM, ALABAMA. HOW LONG HAVE YOU LIVED IN BIRMINGHAM, SIR?

A. WELL, WE MOVED HERE WHEN I WAS FIVE AND LIVED HERE UNTIL I WAS PROBABLY MID 20S, MOVED AWAY TO WORK, COME BACK, I HAVE LIVED HERE SINCE PROBABLY '89 EVER SINCE.

Q. SINCE 1989? NOW, DO YOU KNOW OR ARE YOU FAMILIAR WITH DANNY RAST?

A. YES.

Q. AND HOW ARE YOU FAMILIAR WITH MR. RAST, DANNY RAST?

A. I HAVE KNOWN HIM SINCE THE FIFTH GRADE PROBABLY.

Q. AND DO YOU CONSIDER YOURSELF A FRIEND OF DANNY'S?

[2010] A. YES, I DO.

Q. DO YOU ALSO KNOW BOBBY RAST?

A. YES.

Q. HOW DO YOU KNOW BOBBY RAST?

A. THROUGH THE RAST FAMILY. REALLY BEING FRIENDS WITH DANNY, MET HIS FAMILY AND I HAVE ALSO DONE SOME WORK FOR RAST CONSTRUCTION.

Q. WHAT KIND OF WORK DO YOU DO?

A. I DO DIRECTIONAL DRILLING.

Q. DO YOU HAVE A COMPANY YOURSELF?

A. YES. I OWN MY OWN COMPANY. IT'S DRILL SMITH, INCORPORATED. WE DRILL UNDER RIVERS, ROADS AND CREEKS AND PULL BACK IN UTILITY PIPE AND IT'S KIND OF A

SPECIALTY THING. I WORK – SUBCONTRACT FOR TWO CONTRACTORS.

Q. IN THE TIME THAT YOU HAVE KNOWN BOBBY AND DANNY RAST, HAS THERE BEEN AN OCCASION WHERE DANNY HAS GIVEN YOU SOME ASSISTANCE OR HELPED YOU IN SOME WAY?

A. YES. WE – PROBABLY WHAT I CAN REMEMBER BACK THE FURTHEST, MY FATHER'S HOUSE, WE BUILT A HOUSE AND WE HAD A SINK HOLE DEVELOP IN THE FRONT YARD AND IT WAS PRETTY BIG. IT TOOK TWO TRUCK LOADS TO, DUMP TRUCK LOADS OF DIRT TO FILL IT IN AND I CALLED DANNY AND ASKED TO SEE IF THEY COULD HELP US AND THEY SENT A DUMP TRUCK AND FILLED IT IN FOR US AND THEY DIDN'T CHARGE US ANYTHING FOR THIS.

Q. WAS THERE ANOTHER OCCASION THAT HE HELPED YOU?

[2011] A. YES. HE HAS LET ME BORROW A BACK HOE A COUPLE OF TIMES, BUT MOST RECENTLY WAS AT MY HOUSE. I HAD A BIG – BAD DRAINAGE PROBLEM, AND I KEPT – I THINK I KEPT THAT BACK HOE FOR THREE WEEKS. HE ALSO GAVE ME SOME GRAVEL TO PUT MY PIPE IN WITH, LET ME COME GET SOME, HELP ME OUT THERE. AND WE USED IT, TOOK CARE OF THE DRAINAGE PROBLEM AND

PROBABLY ABOUT THREE WEEKS I HAD THAT BACK HOE.

Q. SO IF YOU HAD TO RENT THAT BACK HOE, DO YOU KNOW WHAT IT WOULD HAVE COST YOU TO RENT IT?

A. I WOULD THINK AROUND – IT DEPENDS WHO YOU RENT IT FROM, BUT 800, $900 A WEEK PROBABLY.

Q. WERE YOU SENT AN INVOICE BY DANNY RAST FOR THE USE OF THAT BACK HOE?

A. NO. HE NEVER CHARGED ME, NOT FOR THE GRAVEL EITHER.

Q. HAS THERE BEEN ANY OTHER OCCASION WHERE DANNY RAST HAS ASSISTED YOU?

A. YES. I CALLED HIM MANY A LITTLE OVER – I GUESS ABOUT A YEAR AGO OR SO, WE WERE – MY COMPANY WAS DOING POORLY AND WE HAD COME OFF A REALLY BAD JOB AND LOST A LOT OF MONEY AND I WAS STRUGGLING WITH BILLS AND WE HAD PRETTY MUCH RUN OUR CREDIT CARD UP AND COULDN'T REALLY BORROW ANY MONEY, OR IT WAS JUST GETTING KIND OF TOUGH TO, AND WE WERE GOING TO BE LATE ON OUR MORTGAGE PAYMENT, AND I CALLED DANNY UP AND ASKED HIM TO COME OVER THE HOUSE TO [2012] TALK TO HIM ABOUT SOMETHING, AND THAT'S WHY THIS FOOTBALL IS HERE. IT'S THE

ONLY THING I COULD THINK OF I REALLY HAD WORTH ANYTHING. I KNEW DANNY WAS A HUGE ALABAMA FAN, HIS FATHER WAS AN ALL-AMERICAN AND THE WHOLE FAMILY ARE HUGE ALABAMA FANS AND THEY HAVE TAKEN ME TO GAMES OVER THE YEARS. AND I OFFERED HIM THIS FOOTBALL AND ASKED HIM IF HE WOULD BUY IT FROM ME FOR $2,000.

Q. AND WHAT DID DANNY SAY?

A. DANNY, HE WROTE A CHECK OUT FOR $2,500, HE HANDED IT TO ME AND TOLD ME, DON'T WORRY ABOUT PAYING ME BACK, YOU KNOW, UNLESS HE TOTALLY WENT BROKE ONE DAY, HE DIDN'T WANT THAT MONEY BACK AND HE TOLD ME TO KEEP THE FOOTBALL. HE WOULDN'T TAKE IT.

Q. SO WHAT ABOUT THAT FOOTBALL MAKES IT SIGNIFICANT?

A. WELL, IT'S A COLLECTOR'S ITEM. I PAID $500 FOR IT, I BELIEVE.

MS. WILEY: OBJECTION.

THE COURT: SUSTAINED.

MS. CHANEY: YOUR HONOR, MAY WE PUBLISH THE FOOTBALL TO THE JURY SO THEY CAN SEE IT?

THE COURT: NOT UNLESS THERE IS NO OBJECTION TO IT FROM THE GOVERNMENT?

MS. WILEY: OBJECTION, RELEVANCY.

THE COURT: SUSTAINED.

* * *

(3) (2) (2)

Nos. 10-516, 10-528 and 10-533

In the Supreme Court of the United States

BOBBY J. RAST, DANIEL B. RAST, AND
RAST CONSTRUCTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

GRADY ROLAND PUGH, SR., AND
ROLAND PUGH CONSTRUCTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

JEWELL C. "CHRIS" MCNAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
CHRISTINE A. VARNEY
Assistant Attorney General
JOHN J. POWERS, III
JOHN P. FONTE
JAMES J. FREDRICKS
WILLIAM D. DILLON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the federal-funds corruption statute, 18 U.S.C. 666, requires proof that a specific payment was solicited, received, or given in exchange for a specific official act.

2. Whether the court of appeals correctly concluded that petitioners failed to establish either that any false testimony was presented at trial or that the prosecutor knew that any testimony was false.

TABLE OF CONTENTS

Page

Opinion below 2
Jurisdiction 2
Statement 2
Argument 11
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Sabri v. *United States*, 541 U.S. 600 (2004) 14
Salinas v. *United States*, 522 U.S. 52 (1997) 14
Skilling v. *United States*, 130 S. Ct. 2896 (2010) 14
United States v. *Abbey*, 560 F.3d 513 (6th Cir.), cert. denied, 130 S. Ct. 739 (2009) 9, 13, 15
United States v. *Agostino*, 132 F.3d 1183 (7th Cir. 1997), cert. denied, 523 U.S. 1079 (1998) 9
United States v. *Ford*, 435 F.3d 204 (2d Cir. 2006) ... 15, 17
United States v. *Ganim*, 510 F.3d 134 (2d Cir. 2007), cert. denied, 552 U.S. 1313 (2008) ... 10, 11, 13, 14, 15, 16
United States v. *Gee*, 432 F.3d 713 (7th Cir. 2005), cert. denied, 547 U.S. 1113 (2006) 9, 15
United States v. *Griffin*, 154 F.3d 762 (8th Cir. 1998) ... 16
United States v. *Jennings*, 160 F.3d 1006 (4th Cir. 1998) 10, 15, 16, 18
United States v. *Kemp*, 500 F.3d 257 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008) 15, 16
United States v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009) ... 15, 16, 18
United States v. *Lopez-Escobar*, 920 F.2d 1241 (5th Cir. 1991) 18

Cases—Continued: Page

United States v. *Mariano*, 983 F.2d 1150 (1st Cir. 1993) 18
United States v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) 15, 16
United States v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) 10, 12, 13
United States v. *US Infrastructure, Inc.*, 576 U.S. 1195 (11th Cir. 2009), cert. denied, 130 S. Ct. 1918 (2010) 9
United States v. *Whitfield*, 590 F.3d 325 (5th Cir. 2009), cert. denied, 131 S. Ct. 124, 131 S. Ct. 134, and 131 S. Ct. 136 (2010) 14

Statutes and rules:

18 U.S.C. 201 10
18 U.S.C. 201(c) 10, 12
18 U.S.C. 201(c)(1)(A) 12
18 U.S.C. 201(b) 10
18 U.S.C. 371 ..... 2, 8
18 U.S.C. 666 ..... *passim*
18 U.S.C. 666(a) 2, 7, 9
18 U.S.C. 666(a)(1)(B) 12, 17
18 U.S.C. 666(a)(2) 12, 17
18 U.S.C. 1341 8
18 U.S.C. 1346 13
18 U.S.C. 1503 8
Fed. R. Crim. P. 52(b) 18
Sup. Ct. R. 12.6 3

In the Supreme Court of the United States

No. 10-516

BOBBY J. RAST, DANIEL B. RAST, AND
RAST CONSTRUCTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 10-528

GRADY ROLAND PUGH, SR., AND
ROLAND PUGH CONSTRUCTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 10-533

JEWELL C. "CHRIS" MCNAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-186) is reported at 605 F.3d 1152.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2010. Petitions for rehearing were denied on July 20, 2010 (Pet. App. 196-197). The petition for a writ of certiorari in No. 10-516 was filed on October 14, 2010, and the petitions for a writ of certiorari in Nos. 10-528 and 10-533 were filed on October 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following four separate jury trials in the United States District Court for the Northern District of Alabama, petitioners were convicted on multiple counts of bribery concerning a program receiving federal funds, in violation of 18 U.S.C. 666(a), conspiracy to commit bribery, in violation of 18 U.S.C. 371, and related offenses. Following a guilty plea in a fifth case, petitioner McNair was also convicted on one additional count of conspiracy to commit bribery. Petitioner Bobby Rast was sentenced to 51 months of imprisonment, to be followed by three years of supervised release, and was fined $2.5 million and ordered to pay restitution. Petitioner Danny Rast was sentenced to 41 months of imprisonment, to be followed by three years of supervised release, and was fined $1 million and ordered to pay restitution. Petitioner Rast Construction, Inc. (Rast) was sentenced to 60 months of probation, was fined $1,702,500, and was ordered to pay restitution. Peti-

[1] Unless otherwise specified, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 10-516.

tioner Grady Roland Pugh, Sr. (Roland Pugh) was sentenced to 45 months imprisonment, to be followed by two years of supervised release, and was fined $250,000. Petitioner Roland Pugh Construction, Inc. (Pugh) was sentenced to 60 months of probation, was fined $19.4 million, and was ordered to pay restitution. Petitioner McNair was sentenced to 60 months of imprisonment, to be followed by two years of supervised release, and was ordered to pay restitution. F.W. Dougherty Engineering & Associates, Inc. (FWDE) was sentenced to 60 months of probation, was fined $3,830,760, and was ordered to pay restitution; its principal Floyd "Pat" Dougherty was sentenced to 51 months of imprisonment, to be followed by three years of supervised release, and was fined $750,000 and ordered to pay restitution.[2] The court of appeals reversed one of Pugh's convictions and remanded for resentencing, but it affirmed in all other relevant respects. Pet. App. 1-186.

1. a. In 1996, McNair—one of five elected commissioners in Jefferson County, Alabama—was responsible for overseeing the Jefferson County Environmental Services Department (JCESD), which at that time began a $3 billion repair and rehabilitation of the county's sewer system. Pet. App. 3-4, 12-14. While most of the sewer construction contracts were awarded through a bidding process, McNair had to approve the contractors' pay requests, any change orders or contract modifications, and no-bid emergency work. *Id.* at 11-12. McNair also selected consulting engineers who were hired under no-bid contracts. *Id.* at 14.

---

[2] Although the Dougherty defendants did not file a petition for a writ of certiorari, they filed a letter with this Court requesting status as persons entitled to relief under Rule 12.6 should the Court grant the petitions that were filed.

McNair owned a photography studio and undertook a major renovation and expansion of it not long after the sewer project began. During the sewer project, McNair approved hundreds of millions of dollars in payments to the Pugh, Rast, and Dougherty defendants, approved millions of dollars in change orders benefitting Pugh and Rast, and approved millions of dollars of no-bid engineering contracts to FWDE, while those defendants contributed materials, labor, and cash to his studio's renovation. Pet. App. 11-16. For example, FWDE provided one of its employees as a full-time "construction superintendent" to oversee construction on the studio by numerous contractors including Pugh and Rast. The $74,240 that FWDE paid the employee for supervising studio construction was recorded on FWDE's books as administration or JCESD sewer-project expenses. *Id.* at 17. Similarly, Pugh provided the concrete and labor to build the walls for the studio, and it paid four of its employees over $11,000 for the work. *Ibid.*; see *id.* at 19-20 (Pugh provided steel for the studio and sent a bill, which FWDE approved, to JCESD).

At McNair's request, Grady Pugh—Roland Pugh's son and, at the time, the CEO and a co-owner of Pugh—flew McNair's daughter to Georgia in the company's airplane and paid a deposit for carpet for his studio. Pet. App. 20. Pugh treated the payment as an expense on one of its JCESD sewer contracts. *Ibid.* McNair also asked Roland Pugh to pay for the studio's $40,000 heating and air-conditioning system, and Roland had his son Grady Pugh deliver an envelope containing cash to McNair. *Id.* at 21 n.13. On at least one other occasion, Grady delivered a cash-filled envelope to McNair at Roland Pugh's direction in response to a McNair solici-

tation. *Ibid.* Roland explained to his son that "this [is] how we do business." 1/10/2007 Tr. 713.

Shortly after McNair's retirement in 2001, Roland Pugh told Grady that McNair had asked him to build McNair a retirement home in Arkansas. Pet. App. 24. Roland explained, "surely this is the last time we'll have to do anything for him since he's out of office." *Ibid.* Later that year, Pugh paid an Arkansas contractor more than $44,000, and FWDE paid that contractor $50,000, toward the construction of McNair's retirement home. *Id.* at 24 & n.15. The suspicious circumstances under which Dougherty had his bookkeeper write the contractor's check caused the bookkeeper to keep a copy of the paperwork at home. When FWDE was later subpoenaed for those documents, the bookkeeper's copy was the only one available. *Ibid.*

b. At about the same time that McNair decided to renovate and expand his studio, JCESD Director Jack Swann decided to renovate and expand his house. Swann received hundreds of thousands of dollars in the form of labor and materials for his renovation project from the contractors that he oversaw. Pet. App. 33-34. During that period, the contractors received significant benefits from Swann. Swann recommended engineering firms, like FWDE, to McNair and negotiated their no-bid contracts. *Id.* at 31-32. Swann also approved payments and granted extensions of time and field directives, which authorized changes or additional work. For example, in March 2000 Pugh requested a 120-day extension on one of its contracts to avoid a $1000 per day liquidated-damages clause. Swann denied the request. Subsequently, nearly a month after the contract's completion date, Pugh renewed its request, this time for a 180-day extension. Five days after Pugh hired a con-

tractor to landscape Swann's property, Swann granted the request. *Id.* at 32; see also *id.* at 32-35 (Swann relieved Rast from its peformance bond, netting Rast millions of dollars, and Rast performed over $54,000 in construction work at Swann's house).

After the government's investigation became public, Bobby Rast told his bookkeeper they "didn't need" any invoices in their files with either McNair's or Swann's address on them. The bookkeeper thereafter discarded several such invoices. Pet. App. 19. Rast also amended several years of tax returns to delete more than $140,000 in payments it made for the McNair and Swann renovations that it originally had deducted as sewer project expenses. *Id.* at 18. Similarly, after hearing of the investigation and to account for its landscaping payments, Pugh sent a $12,572 invoice to Swann's mother-in-law for tree removal and remolding work. *Id.* at 37.

c. McNair and Swann's subordinates included JCESD's Chief Civil Engineer Ronald Wilson, Assistant Director Harry Chandler and Engineer Donald Ellis. Those officials approved the contractors' payments and authorized field directives and were also members of a committee that set technical standards for the sewer project. Pet. App. 13, 43.

The Pugh, Rast, and Dougherty defendants gave goods, labor, and cash to Chandler and Ellis. Pet. App. 25. Pugh provided crews and paid for the materials for extensive landscaping at Chandler's home. *Ibid.* Pugh's president also paid for a condo rental for the Chandler family's vacation at a Florida resort, while FWDE gave Chandler tickets to Disney World. *Id.* at 25-26. And Bobby Rast gave Chandler $5000 in cash to split with Ellis. *Id.* at 26.

In mid-1999, Wilson told Grady Pugh that he might not be able to afford his son's upcoming college semester, which prompted Grady to offer a "scholarship" for Wilson's son. Pet. App. 45. In July 1999, Pugh submitted a request for an extension of time on a contract with a past-due completion date of May 11, 1999. That request sat on Wilson's desk for nearly a month, until Wilson faxed Grady a letter explaining how Grady should credit $4500 to Wilson's son's college account. Three days later, Wilson approved Pugh's extension request; Pugh sent a $4500 check to the college the next day. *Id.* at 43.

d. Clarence Barber, JCESD's construction maintenance supervisor, oversaw the county's 26 inspectors and administered "emergency" sewer work—jobs that needed immediate attention and that were awarded on a no-bid basis. Pet. App. 13-14, 48. In January 2000, Barber decided to replace a set of sewer pipes on an emergency basis instead of repairing them. Eventually, Pugh was awarded an $857,000 no-bid contract on which it made a 50% profit. *Id.* at 49. Later that spring, Barber asked Pugh's president, Eddie Yessick, to buy him a lot on which he could build a retirement home. Yessick eventually put a down payment on a $47,500 lot in the name of Roland Pugh. Before closing, however, Yessick was told to close the transaction in Barber's name, not Roland's, and to get back from the realtor all documents referring to Pugh. Pugh thereafter gave Barber a cashier's check for $46,877 on which the "name of remitter" line was left blank. *Id.* at 50.

2. A grand jury in the Northern District of Alabama returned a 127-count indictment charging 16 defendants with bribery concerning a program receiving federal funds, in violation of 18 U.S.C. 666(a), conspiracy to

commit bribery, in violation of 18 U.S.C. 371, honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346, and obstruction of justice, in violation of 18 U.S.C. 1503. The indictment was severed into five separate cases for trial, and McNair entered a conditional plea of guilty to one count of conspiracy to accept a bribe. Pet. App. 7-9.

At the various trials, petitioners, for the most part, did not dispute that they gave the things of value charged in the indictment. Pet. App. 26-27. Rather, they argued that they gave those things only out of friendship and therefore lacked corrupt intent. *Id.* at 27, 38. They also argued that 18 U.S.C. 666 requires proof of a specific *quid pro quo*, that is, proof that a specific payment was solicited, received, or given in exchange for a specific official act. They argued that the indictment was deficient for failing to allege any specific *quid pro quo* and that the courts were required to charge the juries that the government had to prove a specific *quid pro quo*. Pet. App. 27, 52; see *id.* at 71 n.46.

In the first of petitioners' cases to be tried, the district court concluded that Section 666 does not require a specific *quid pro quo* and refused to give petitioners' proposed instructions. It did, however, instruct the jury that the statute "does not prohibit all gifts by or to a public official, * * * but only gifts received with the corrupt intent to be influenced or rewarded * * * in connection with a business or transaction or series of transactions of that governmental entity involving $5,000 or more." Pet. App. 76. In the subsequent cases, the courts gave similar instructions. *Id.* at 71-76 & n.52. The juries found petitioners guilty on multiple counts.

3. Nine separate defendants in four of the trials filed a total of 15 appeals, which the court of appeals

consolidated.[3] The court reversed one of Pugh's conspiracy convictions on the basis of the statute of limitations, and it remanded for resentencing. It also vacated the fine imposed on Swann and remanded for reconsideration of the amount of the fine. In all other respects, the court of appeals affirmed. Pet. App. 1-186.

The court of appeals held that the district courts had not erred in refusing to instruct the jury that it was required to find that a specific payment was solicited, received, or given in exchange for a specific official act. The court noted that Section 666 contains neither the term *quid pro quo* nor similar "language such as 'in exchange for an official act' or 'in return for an official act.'" Pet. App. 59. Instead, the court observed, the statute requires, for the county employees, that the defendant "'corruptly' accepted 'anything of value' with the intent 'to be influenced or rewarded in connection with any business, transaction, or series of transactions' of the County," and for the contractors, "that the defendant 'corruptly' gave 'anything of value' to a County employee with the intent 'to influence or reward' that person 'in connection with any business, transaction, or series of transactions' of the County." *Id.* at 60-61 (quoting 18 U.S.C. 666(a)).

The court of appeals noted that its interpretation of the statute was consistent with the Sixth Circuit's decision in *United States* v. *Abbey*, 560 F.3d 513, 520, cert. denied, 130 S. Ct. 739 (2009), and the Seventh Circuit's decisions in *United States* v. *Gee*, 432 F.3d 713, 714-715 (2005), cert. denied, 547 U.S. 1113 (2006), and *United States* v. *Agostino*, 132 F.3d 1183, 1189-1190 (1997), cert.

---

[3] The convictions from the fifth trial were separately appealed. *United States* v. *US Infrastructure, Inc.*, 576 F.3d 1195 (11th Cir. 2009), cert. denied, 130 S. Ct. 1918 (2010).

denied, 523 U.S. 1079 (1998). Pet. App. 62-63. The court also found support in the Second Circuit's decision in *United States* v. *Ganim*, 510 F.3d 134, 142, 147 (2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008), which concluded that Section 666 prohibits covered state and local officials from corruptly accepting things of value with the intent of performing official acts "as the opportunities arise." Pet. App. 63-64. The court noted that the Fourth Circuit has construed the statute to require a "course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor," *id.* at 63 (quoting *United States* v. *Jennings*, 160 F.3d 1006, 1014 (1998)) but it explained that, even under that standard, "the evidence here was sufficient, and thus any jury charge error was harmless," *id.* at 85 n.59.

The court of appeals rejected petitioners' suggestion that this Court's decision in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), requires a contrary result. In *Sun-Diamond*, this Court interpreted the illegal-gratuities provision of 18 U.S.C. 201, which prohibits gratuities given or received "for or because of any official act performed or to be performed." 18 U.S.C. 201(c). The Court held that the statute required "that some particular official act be identified and proved." 526 U.S. at 406. The court of appeals recognized that the Court had contrasted Section 201(c) with 18 U.S.C. 201(b), a bribery provision that the Court described as requiring a *quid pro quo*. Pet. App. 67 (quoting *Sun-Diamond*, 526 U.S. at 404). But it noted that "there are significant differences in the text of" Sections 201 and 666. *Id.* at 65. The court thus agreed with the Second Circuit's conclusion that there is no "principled reason to extend *Sun-Diamond*'s holding

beyond the illegal gratuity context." *Id.* at 69 (quoting *Ganim*, 510 F.3d at 146).

Finally, the court of appeals rejected the claim that the prosecutor knowingly used false testimony to secure Roland Pugh's conviction. The court concluded that petitioners had failed to show that any testimony was false, that the prosecutor knew it was false, or that any of the alleged falsehoods were material. Pet. App. 107-120.

ARGUMENT

Petitioners contend (Pet. 21-32; 10-533 Pet. 17; 10-528 Pet. 18-20) that the district courts erred in failing to instruct the juries that petitioners could not be convicted of bribery under the federal-funds corruption statute, 18 U.S.C. 666, unless, at the time money or other things of value changed hands, they had already identified the specific official action or actions they corruptly intended to influence or to be influenced in. Petitioner Roland Pugh also argues (10-528 Pet. 21-24) that the prosecutor knowingly presented false testimony at his trial. The court of appeals correctly rejected those claims, and further review is not warranted.

1. Petitioners argue (Pet. 21-32; 10-533 Pet. 17; 10-528 Pet. 18-20) that a conviction under Section 666 requires the government to prove a "specific" *quid pro quo*—that is, that a specific thing of value was solicited, received, or given in exchange for an identifiable official act. That argument lacks merit.

Section 666 makes it unlawful for an agent of a local government receiving federal funds to "corruptly solicit[] or demand[] * * * or accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" of the

local government involving $5000 or more. 18 U.S.C. 666(a)(1)(B). It also makes it unlawful to "corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward" such an agent "in connection with any business, transaction, or series of transactions" of the local government involving $5000 or more. 18 U.S.C. 666(a)(2). The court of appeals correctly concluded that nothing in Section 666 "requires that a specific payment be solicited, received, or given in exchange for a specific official act." Pet. App. 59. If the rule were otherwise, the court observed, a corrupt contractor could "pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating" the statute. *Ibid.*

a. Petitioners assert (Pet. 7-8; 10-533 Pet. 14-17; 10-528 Pet. 18-21) that the decision below is inconsistent with *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), but that is incorrect. In *Sun-Diamond*, this Court interpreted the illegal-gratuity statute, 18 U.S.C. 201(c)(1)(A), which prohibits "giv[ing] * * * anything of value to any public official * * * for or because of any official act performed or to be performed by such public official." In concluding that Section 201(c) requires an illegal gratuity to be connected to "some particular official act," rather than to be given solely because of the recipient's official position, the Court emphasized that a contrary interpretation would cause "peculiar results," such as criminalizing "token gifts to the President based on his official position and not linked to any identifiable act." 526 U.S. at 406.

As the Court emphasized in *Sun-Diamond*, however, bribery statutes contain a *mens rea* different from that of the gratuity statute, requiring a corrupt intent to in-

fluence or to be influenced. 526 U.S. at 404. Because Section 666 requires proof of a "corrupt" intent, the court of appeals correctly observed that its interpretation of that provision, unlike the interpretation of Section 201 rejected in *Sun-Diamond*, would not criminalize "acceptable business practices." Pet. App. 60; see *id.* at 68-69. Accordingly, no "principled reason" exists to extend *Sun-Diamond* "beyond the gratuity context" and apply it to Section 666. *United States* v. *Ganim*, 510 F.3d 134, 146-147 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008); accord *United States* v. *Abbey*, 560 F.3d 513, 521 (6th Cir.), cert. denied, 130 S. Ct. 739 (2009).

Nor does the *Sun-Diamond* Court's discussion of *quid pro quo* cast doubt on the reasoning of the court below. In *Sun-Diamond*, the Court noted that the bribery provisions in Section 201 require an "intent 'to influence' an official act or 'to be influenced' in an official act," in other words, a "*quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act." 526 U.S. at 404-405. Petitioners seize on that language to argue that bribery under any statute requires a specific *quid pro quo*. Pet. 12 ("*Sun-Diamond* * * * expressly defined 'bribery' for purposes of Federal criminal law."); 10-528 Pet. 18-20; 10-533 Pet. 16-17. But *Sun-Diamond* did not involve, and thus did not address, the question whether bribery can be established by an intent to exchange something of value for official acts, even where the official acts to be undertaken have not yet been determined. And this Court has not required a specific *quid pro quo*, as suggested by petitioners, in the context of other bribery statutes. For example, in defining bribery for purposes of 18 U.S.C. 1346, the Court has cited with approval de-

cisions upholding convictions in cases where bribes were given in exchange for a stream of future benefits, even though the specific official acts to be performed had not been identified at the time the bribes were given. See *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 (2010) (citing *Ganim*, 510 F.3d at 147-149, and *United States* v. *Whitfield*, 590 F.3d 325, 352-353 (5th Cir. 2009), cert. denied, 131 S. Ct. 124, 131 S. Ct. 134, and 131 S. Ct. 136 (2010)).

Petitioners are therefore asking this Court to adopt a narrowing construction of Section 666 that lacks support in *Sun-Diamond* or any language in the statute. This Court has previously declined to place such nontextual limits on Section 666. For example, in *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court concluded that "[t]he enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered," and especially "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose [petitioner's] narrowing construction" that would have limited Section 666 bribes to only those affecting federal funds. *Id.* at 56-57. Likewise, in *Sabri* v. *United States*, 541 U.S. 600 (2004), the Court observed that Congress chose to protect the funds it disburses to state and local government agencies by ensuring "the integrity of the state, local, and tribal recipients of federal dollars." *Id.* at 605. The Court explained that "bribed officials are untrustworthy stewards of federal funds," noting that "officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers." *Id.* at 606. If this Court were to impose a specific-official-act requirement on Section 666, such "general retainers" are precisely what the statute would allow.

b. The courts of appeals have uniformly upheld convictions under Section 666 in cases involving an intent to exchange something of value for official acts, even where the official acts to be undertaken have not been determined with precision. See *United States* v. *Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996); *Ganim*, 510 F.3d at 141-142; *United States* v. *Kemp*, 500 F.3d 257, 282 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008); *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998); *Abbey*, 560 F.3d at 519; *United States* v. *Gee*, 432 F.3d 713, 714-715 (7th Cir. 2005), cert. denied, 547 U.S. 1113 (2006); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 943 & n.15 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009). Like the court of appeals in this case, other courts of appeals have concluded that the intent—or *quid pro quo*—element is exactly what the express language of the statute says: a corrupt intent to influence or reward a government employee in connection with any business or transaction of the government agency. See, *e.g.*, *Abbey*, 560 F.3d at 521; *United States* v. *Ford*, 435 F.3d 204, 213 (2d Cir. 2006). As the Seventh Circuit has explained, "[a] *quid pro quo* of money for a specific legislative act is *sufficient* to violate [Section 666], but it is not *necessary*. It is enough if someone 'corruptly solicits * * * anything of value from any person, intending to be influenced or rewarded in connection with any business.'" *Gee*, 432 F.3d at 714-715.

Contrary to petitioners' assertion (Pet. 21-25; 10-533 Pet. 17-18), the decision below does not conflict with the Second Circuit's decision in *Ganim* or the Fourth Circuit's decision in *Jennings*. As the court of appeals correctly noted, both cases approved a retainer, or stream-of-benefits, theory of liability that is consistent with both the holding and evidence in this case. Pet. App. 63-

65, 84-85 n.59. Thus, in *Ganim*, the court concluded that in order to prevent "legaliz[ing] some of the most pervasive and entrenched corruption," a jury "need not find that the specific act to be performed was identified at the time of the promise." 510 F.3d at 147. Rather, it held, Section 666 must be interpreted to reach "a scheme involving payments at regular intervals in exchange for specific officials acts as the opportunities to commit those acts arise." *Ibid.* The *Jennings* court similarly concluded that Section 666 reaches "payments * * * made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf." 160 F.3d at 1014. Accord *Kincaid-Chauncey*, 556 F.3d at 943 n.15 ("It is sufficient * * * if the evidence establishes that the government official has been put on 'retainer.'"); *Kemp*, 500 F.3d at 281-282; *Sawyer* 85 F.3d at 730.[4]

In any event, this case would be a poor vehicle for resolving any alleged conflict over the intent element of Section 666 because, as the court of appeals noted, the overwhelming evidence at the trials was sufficient to uphold the convictions under the approaches taken by other circuits, and thus any error in the jury instructions was harmless. Pet. App. 84-85 n.59. Accordingly, resolution of the supposed conflict would not affect the ultimate outcome of this case.

---

[4] Petitioners err in suggesting (Pet. 25-27, 10-528 Pet. 16-17) that the decision below conflicts with *United States* v. *Griffin*, 154 F.3d 762 (8th Cir. 1998), and *United States* v. *Mariano*, 983 F.2d 1150 (1st Cir. 1993). Those cases involved application of the Sentencing Guidelines provisions concerning bribes and illegal gratuities; the courts had no occasion to consider the elements of an offense under Section 666.

2. McNair contends (10-533 Pet. 18) that, "although ostensibly holding only that no *specific* quid pro quo need be found for a conviction under § 666, the Eleventh Circuit actually held that *no* quid pro quo need be shown for a conviction under § 666." That is incorrect. The court of appeals "expressly [held] there is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a *specific* payment was solicited, received, or given in exchange for a *specific* official act." Pet. App. 60 (emphasis added). That is the sense in which the court rejected a *quid pro quo* requirement. It instead aligned itself with courts that permit the *quo* to be satisfied by "an unidentified, official act at some point in the future." *Id.* at 65.[5] While the Eleventh Circuit did not adopt the term *quid pro quo*, its holding comports with decisions of other courts of appeals that "use the term *quid pro quo* to describe an exchange other than a particular item of value for a particular action," *ibid.*, and that describe an intent to be influenced as a *quid pro quo*. See *Ford*, 435 F.3d at 213 (explaining that the requirement of "accept[ing] the thing of value while 'intending to be influenced'" constitutes "a *quid-*

---

[5] As the court explained:

> [N]othing in the plain language of § 666(a)(1)(B) nor § 666(a)(2) requires that a specific payment be solicited, received, or given in exchange for a specific official act. To accept the defendants' argument would permit a person to pay a significant sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating § 666.

Pet. App. 59. The court repeatedly referred to its holding as a rejection of any requirement of a "specific" *quid pro quo*, summarizing its holding as "[s]imply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee." *Id.* at 61.

pro-quo"); *Kincaid-Chauncey*, 556 F.3d at 944-945 (concluding that in the jury instruction in an honest-services-fraud case based on bribery, the words "[i]f * * * the official accepts something of value with an intent to be influenced" contain "an implicit *quid pro quo*").[6]

Because the court of appeals merely rejected petitioners' argument that Section 666 requires proof of a specific *quid pro quo*, McNair's claims that Section 666 is void for vagueness (10-533 Pet. 24-26) and that the jury charges that were patterned on the language of Section 666 were erroneous (10-533 Pet. 26-27), are incorrect.[7] No court has declared Section 666 void for vagueness or disapproved of jury instructions that track the statute's

---

[6] Petitioners' complaints about the court's definition of the term "corruptly" (Pet. 35, 10-533 Pet. 35) overlook that the court's definition was virtually identical to every definition offered in defendants' proposed jury instructions. Compare, *e.g.*, Pet. App. 73 (quoting definition of "corruptly" given by the district court), with 10-528 Pet. 13 (quoting Pugh's proposed definition of "corruptly"). Petitioners cannot challenge a jury instruction that is consistent with their own proposal. Fed. R. Crim. P. 52(b); see *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991) ("A party cannot complain on appeal of errors which he himself induced the district court to commit."). Additionally, petitioners' claim (10-533 Pet. 36) that "[t]he jury charge held to be plain error in *Jennings* was essentially identical to the one given by the trial court in this case," is incorrect. In *Jennings*, the jury instruction conflated "corruptly" with "intent to influence" by charging that "the government must prove * * * that [Jennings] did so corruptly, that is, with the intent to influence or reward," which erroneously "suggest-[ed] that § 666 prohibits *any* payment made with a generalized desire to influence or reward (such as a goodwill gift)." 160 F.3d at 1019-1020 (brackets in original). Here, the district courts made no such error.

[7] The court of appeals did not address McNair's argument that the Due Process Clause compels his construction of Section 666 (10-533 Pet. 24-28) because McNair did not make that argument below.

language. McNair's argument is based wholly on his erroneous view (10-533 Pet. 18-19, 22) that the court of appeals held that Section 666 does not require proof of any *quid pro quo* at all.

3. Roland Pugh argues (10-528 Pet. 21-24) that the government knowingly introduced false testimony at his trial by presenting the testimony of his son Grady to the effect that certain cash payments were made before the statute of limitations expired. The court of appeals determined that Roland Pugh had failed to show that the "testimony was actually false, much less that the government knew it was false." Pet. App. 116. Petitioner makes no effort to show that the court of appeals applied an incorrect legal standard, and his factbound challenge to its assessment of the record does not warrant this Court's review. And because there was no false testimony in this case, the court's conclusions that the "uncorrected, allegedly perjurious statements do not undermine confidence in the verdict" and that there was no "reasonable likelihood that correction" of the supposed falsehoods "could have changed the jury's evaluation of [the] overall credibility" of a government witness are similarly unworthy of review. *Id.* at 118, 120 (internal quotation marks omitted).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
CHRISTINE A. VARNEY
Assistant Attorney General
JOHN J. POWERS, III
JOHN P. FONTE
JAMES J. FREDRICKS
WILLIAM D. DILLON
Attorneys

FEBRUARY 2011

81

No. 10-516

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOBBY J. RAST, DANIEL B. (DANNY) RAST, AND RAST CONSTRUCTION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

WILLIAM N. CLARK*
WILLIAM H. MILLS
GLORY R. MCLAUGHLIN
REDDEN, MILLS & CLARK, LLP
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457
WNC@rmclaw.com
WHM@rmclaw.com
GRM@rmclaw.com

TERRY W. GLOOR
100 Williamsburg Office Park
Suite 100
Birmingham, Alabama 35216
(205) 822-1223
TWG@gloorstrickland.com

Attorneys for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Respondent's argument overemphasizes the general nature of statutory language and ignores the realities and requirements of a specific prosecution 1

II. The Eleventh Circuit decision conflicts with a decision of this Court 5

III. A decision clarifying the requirements for a bribery conviction is important to uniformity and consistency in federal criminal jurisprudence 6

IV. The harmless error doctrine does not apply to this case 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Russell v. United States, 369 U.S. 749 (1962) 2

Sabri v. United States, 541 U.S. 600 (2004) 4

Salinas v. United States, 522 U.S. 52 (1997).....4

Skilling v. United States, 130 S.Ct. 2896 (2010) 6, 7

United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998) 3, 4, 8

United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999).....3, 5

U.S. CONSTITUTION

U.S. CONST. Amend. V 1

U.S. CONST. Amend. VI.....1

STATUTES

18 U.S.C. §201 .....3, 5, 6

18 U.S.C. §201(b).....5

18 U.S.C. §201(c)(1)(A).....5

18 U.S.C. §666 .....1, 3, 4, 6

18 U.S.C. §666(a)(2).....2

1984 U.S.C.C.A.N. 3182, 3510 .....3, 5

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIAL

Report to Congress on Activities and Operations of the Public Integrity Section for 2009, Public Integrity Section, Criminal Divisions, United States Department of Justice, 51-53 6

REPLY BRIEF OF PETITIONERS

This reply brief is filed by Petitioners to respond to the brief in opposition filed by the Respondent.

ARGUMENT

I. Respondent's argument overemphasizes the general nature of statutory language and ignores the realities and requirements of a specific prosecution.

In somewhat of a departure from positions taken by the Respondent in the District Court and in the Eleventh Circuit, Respondent's brief dwells on the generality of the language in 18 U.S.C. §666. In doing so it fails to recognize the immutable conclusion and understanding that criminal statutes may be written in general and conclusionary language but when they are applied in individual prosecutions the general and conclusionary language must be transformed to specifics to describe particular individuals, entities, and occurrences which demonstrate a charged crime. This is necessary to the due process notice requirements of the nature and cause of an accusation guaranteed by the Fifth Amendment as well as to the Sixth Amendment assurance of a fair jury trial.

Section 666 is a statute replete with general expressions. It describes in general and conclusionary terms the participants in and the conduct intended by Congress to constitute a crime. That general and conclusionary language does not suffice in the context

of a specific prosecution, in the milieu of indictments, evidence, and jury instructions, to describe in a meaningful way the alleged conduct that constitutes a specific violation or the participants in that alleged conduct which are charged to be the basis for a criminal conviction. As it relates to §666(a)(2), this means that an indictment, the evidence, and the jury instructions must supply specificity rather than the general labels, such as "corruptly," "any person," "an agent," "anything of value," "intent to influence or reward" and "in connection with any business, transaction, or series of transactions," found in the statute.

The Respondent apparently does not dispute the general assumption that a bribery, including a bribery under §666, requires a *quid pro quo*. Respondent's argument is simply that the *quid pro quo* need not be identified, whether in the indictment or the Government's proof. The Respondent seems to be saying that there must be a *quid pro quo*, which means proof of an exchange, this for that or these for those. A *quid pro quo* (which is nothing more than an exchange) makes no sense in a particular criminal prosecution if the items (benefits) being exchanged are not identified. The exchange charged in a particular prosecution obviously cannot be stated and proven unless the *quid pro quo* (both the "*quid*" and the "*quo*") is identified. To permit otherwise would allow the Government at trial to simply throw out different theories and hope one sticks. Such is constitutionally impermissible. See *Russell v. United States*, *369 U.S. 749, 763 (1962)*.

Respondent's brief points out, as did the Eleventh Circuit opinion, that §666 does not use the expression "*quid pro quo.*" This omission is of no significance. Neither does §201. In enacting §666 Congress was unquestionably undertaking to criminalize bribery committed by persons other than federal officials where federal funds were involved. See 1984 U.S.C.C.A.N. 3182, 3510; *United States v. Jennings, 160 F.3d 1006, 1012-13 (4th Cir. 1998).* Certainly, Congress was aware that the concept of bribery included the concept of a *quid pro quo*. Consequently, Congress, in enacting §666 so as to extend the bribery offense to cover other persons, intended it to include the *quid pro quo* requirement for state, county, and local officials and others where federal funds are involved. It would make no legal or procedural sense to have a different standard.

There can be no doubt that this Court has recognized that bribery under §201 requires a *quid pro quo*. *United States v. Sun-Diamond Growers of California, 526 U.S. 398, 404-05 (1999)* makes this clear. This being true, it is futile to contend §666 does not include a *quid pro quo* element since, as discussed above, they are kindred statutes directed toward the same type of misconduct. The Respondent is attempting to salvage somewhat the Eleventh Circuit opinion by saying that it recognizes the requirement for a *quid pro quo*, just not a specific one. While Petitioner does not agree with that interpretation of the Eleventh Circuit opinion, if that were the case the

Eleventh Circuit opinion and Respondent's brief are tilting at a windmill.

If §666 includes a *quid pro quo* requirement it is nonsensical to argue that a specific prosecution may be maintained and a conviction had where either the "*quid*" or the "*quo*" are not identified in the accusation and in the evidence and in the jury instructions used by a jury in weighing the evidence.

The citation in Respondent's brief of *Salinas v. United States, 522 U.S. 52 (1997)* and *Sabri v. United States, 541 U.S. 600 (2004)* as decisions of this Court supporting the "no *quid pro quo*," or "nebulous *quid pro quo*," position are misplaced. In the *Sabri* case the question decided, as it relates to §666, was that §666 was a valid exercise of Congressional authority. In the *Salinas* case the only question involving §666 was whether it was limited to cases where the conduct of the accused directly affected federal funds. Neither of these opinions hint that it is proper to convict of bribery without proof of a specific *quid pro quo*. The argument in Respondent's brief that the *Ganim* and *Jennings* cases approve an unspecific identification of the *quid pro quo* in a bribery prosecution by approving what is described as a "stream of benefits" theory does not support the argument of Respondent's brief that proof of a specific *quid pro quo* is not required. In those cases each individual benefit was specifically identified. In the *Jennings* case individual building contracts were awarded to a contractor following his individual payments to a city official. In the *Ganim* case it was a specific series of city contracts awarded

by a defendant mayor, each of which was fully identified and related to payments or other benefits given the mayor.

II. The Eleventh Circuit decision conflicts with a decision of this Court.

In support of its argument that the decision of the Eleventh Circuit in the present case does not conflict with this Court's decision in *United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999)* the Respondent's brief argues that the *Sun-Diamond* case did not involve §666. While this is abstrusely true it is practically and realistically untrue. The Respondent attempts to limit *Sun-Diamond* to its holding regarding the illegal gratuity part of §201, i.e., §201(c)(1)(A), but in deciding that issue, the Court clearly recognized that under §201(b), the bribery part of the statute, that a specific *quid pro quo* is required.

As was pointed out in the petition, §666 was enacted by Congress for the express purpose of extending the bribery offense described in §201(b) to state officials and others where federal funds were involved. See 1984 U.S.C.C.A.N. 3182, 3510. Congress obviously meant for the basic elements of bribery to be the same in §201(b) and in §666. Consequently, the *Sun-Diamond* definition of bribery is applicable to this case. The Eleventh Circuit concept of §666 bribery is obviously in conflict with the *Sun-Diamond* concept.

III. A decision clarifying the requirements for a bribery conviction is important to uniformity and consistency in federal criminal jurisprudence.

Respondent's brief generally belittles the importance of a decision clarifying the elements of bribery in Federal criminal prosecutions. According to the Department of Justice Public Integrity Section, in the year 2009, 1,082 individuals were charged with public corruption offenses and in the 20 year period between 1999 and 2009, a total of 23,179 individuals were charged in public corruption cases. See, Report to Congress on Activities and Operations of the Public Integrity Section for 2009, Public Integrity Section, Criminal Division, United States Department of Justice, 51-53. It is common knowledge that many, probably most, public corruption cases involve bribery in some form.

An unscientific search of the Westlaw data base by Petitioners' counsel revealed that in the past 10 years 204 cases in United States Courts of Appeals have involved either §666 or §201. The recent decision of this Court in *Skilling v. United States, 130 S.Ct. 2896 (2010)* assigns a new and expanded role to the concept of bribery in Federal prosecutions, e.g., this Court said that in honest services cases under 18 U.S.C. §1346 the lower courts should look to §201 and §666 to "draw content" of bribery. *Skilling*, 134 S.Ct. at 2934. If bribery under §201 means one thing and under §666 another the "content" to be drawn is confusing. Consequently, due to the significance of

Skilling in many current and future prosecutions, and the large number of bribery cases being prosecuted, the present case presents a compelling entreaty for the exercise of this Court's supervisory powers to ensure uniformity and consistency of Federal criminal laws relating to bribery. A decision providing this clarity is of great importance to Federal criminal jurisprudence.

IV. The harmless error doctrine does not apply to this case.

Respondent's brief injects the harmless error doctrine as a reason for not granting certiorari in this case (Br.16). It argues that even if Petitioner's position that the *quid pro quo* exchanged in a bribery must be identified this would not affect the ultimate outcome of this case. This argument overlooks several salient points.

First, this is not a case where the benefits flowing from the Petitioners to public officials were not explained by evidence of innocent causation. Substantial evidence (see App.343-486) explained non-corrupt reasons for Petitioners' gifts to the county officials. Without requiring proof of some nexus between a gift and an identifiable benefit accruing to the giver in exchange for the gift, which the jury was instructed was not required under the law applicable to this case, the jury was effectively told it should ignore all of the evidence explaining an innocent motive for any gift. Such erroneous instructions were particularly

not harmless in this case where Petitioners were charged (and convicted) of multiple briberies, each associated with a particular gift by Petitioners but not associated with a particular benefit received or promised to Petitioners in exchange for the particular gift, and there was an absence of any evidence of any discussions, promises, or agreements for any exchange. The evidence was that the Rast Defendants and Rast Construction had been doing business with Jefferson County for fifty years or so and had an outstanding reputation.

It also should be noted that this is not a case like *United States v. Jennings*, *160 F.3d 1006 (4th Cir. 1998)*, which Respondent's brief cites and relies on for its harmless error argument. In that case the defendant denied making any payments and the primary issue was whether the payments were in fact made, not whether they were innocently made. That case, where overwhelming evidence proved the payments and no evidence provided an innocent explanation for them, does not support a harmless error argument as excusing an erroneous *quid pro quo* jury charge in this case.

The harmless error argument is especially unavailing in this multiple bribery conviction case. The Petitioners stand convicted of multiple counts of bribery. No identifiable *quid pro quo* distinguishes one count from the other. Further, even if the "stream of benefits" theory of *quid pro quo* mentioned in Petitioners' brief were a valid theory and was adapted to this case, this case would consist of a

single bribery, not multiple briberies. Therefore, the harmless error doctrine does not support a conclusion that resolving the conflict between the decision in this case and other decisions of this Court and the conflict between the Circuits would not affect the ultimate outcome of this case.

CONCLUSION

For the reasons discussed above and in their petition for writ of certiorari, Petitioners pray that their petition be granted.

Respectfully submitted,

WILLIAM N. CLARK*
WILLIAM H. MILLS
GLORY R. MCLAUGHLIN
REDDEN, MILLS & CLARK, LLP
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457

TERRY W. GLOOR
100 Williamsburg Office Park
Suite 100
Birmingham, Alabama 35216
(205) 822-1223

Attorneys for Petitioners

**Counsel of Record*